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Oliver Ting

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PIRATES OF THE ORIENT: CHINA, FILM PIRACY, AND HOLLYWOOD

I. INTRODUCTION

On September 28, 2006, a reporter in China purchased a digital versatile disc ("DVD") "from a brightly lit and well-organized shop opening onto a popular Beijing bar street frequented by expatriates and just around the corner from a police station."¹ The DVD was a high quality illegal copy of *Superman Returns*, complete with a crisp cover and bilingual audio and subtitle options.² While seemingly routine, this transaction typifies the Motion Picture Association of America's ("MPAA")³ continuous fight with Chinese film piracy: the DVD was a "pristine" counterfeit version selling for a mere \$1.25.⁴

According to the Motion Picture Association ("MPA"), China's piracy rate has increased each year since 2004.⁵ Making matters worse, this upward trend signifies that the World Trade Organization ("WTO"), which China joined in 2001, has failed to corral Chinese piracy.⁶ According to recent trends, China's compliance with

1. *Bootlegging Returns with Superman Sequel*, REUTERS NEWS SERVICE, Sept. 29, 2006, http://news.zdnet.com/2102-3513_22-6121137.html?part=rss&tag=feed&subj=zdnet [hereinafter *Bootlegging Returns*] (describing typical digital versatile disc ("DVD") purchase in Beijing).

2. See *id.* (noting condition of DVD).

3. See Motion Picture Association of America, <http://www.mpa.org/AboutUs.asp> (last visited Apr. 8, 2007) (explaining functions of MPAA). "The Motion Picture Association of America (MPAA) and its international counterpart, the Motion Picture Association (MPA) serve as the voice and advocate of the American motion picture, home video and television industries, domestically through the MPAA and internationally through the MPA." *Id.*

4. See *Bootlegging Returns*, *supra* note 1 (illustrating prevalence of high quality and cheap counterfeit DVDs in China). For a further discussion of the differences and similarities between legitimate and counterfeit DVDs, see *infra* notes 75-85 and accompanying text.

5. See Motion Picture Association of America, http://www.mpa.org/inter_asia.asp (last visited Apr. 8, 2007) (detailing growing piracy trend in China). The MPA estimates that between 2000 and 2004, member companies lost over \$900 million in potential revenue in China. See *id.* "Piracy is the unauthorized duplication and sale of another's creative work." Gerardo Lara, *The Piracy of American Films in China: Why the U.S. Art Form Is Not Protected by Copyright Laws in the People's Republic of China*, 2 UCLA J. INT'L L. & FOREIGN AFF. 343, 344 (1997) (defining piracy within intellectual property context).

6. See Carl Erik Heiberg, *American Films in China: An Analysis of China's Intellectual Property Record and Reconsideration of Cultural Trade Exceptions Amidst Rampant Piracy*, 15 MINN. J. INT'L L. 219, 228, 231-32 (2006) (concluding that China has not yet enacted effective enforcement measures in accordance with the Agreement on

the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), the intellectual property ("IP") arm of the WTO, can be summed up by Keira Knightley's character in *Pirates of the Caribbean: The Curse of the Black Pearl*: "Hang the code, and hang the rules. They're more like guidelines anyway."⁷ As the quote suggests, the crux of the Chinese piracy problem is not the lack of concrete copyright laws, but rather the failure to enforce them properly.⁸ To complicate matters, China's central government ("Beijing") may lack the ability to rein in film piracy even if it wanted to.⁹ All of this is particularly draining on Hollywood, as Chinese film piracy in 2005 alone cost the MPA studios \$244 million in lost revenue.¹⁰

Trade-Related Aspects of Intellectual Property Rights ("TRIPS")). China formally joined the World Trade Organization ("WTO") on December 11, 2001. *See id.* at 228. All WTO members must comply with TRIPS. *See id.* at 229.

7. Memorable Quotes from *Pirates of the Caribbean: The Curse of the Black Pearl* (2003), <http://www.imdb.com/title/tt0325980/quotes> (last visited Apr. 8, 2007) (listing quotes from *Pirates of the Caribbean: The Curse of the Black Pearl*). For a further discussion of China's failure to comply with TRIPS, see *infra* notes 35-56 and accompanying text.

8. *See* Brent T. Yonehara, *Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws*, 12 DEPAUL-LCA J. ART AND ENT. L. & POL'Y 63, 66-67 (2002) (asserting reasons for China's inability to enforce its laws); *see also* Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795, 797 (2006) ("According to copyright industry estimates, more than 90% of all music CDs, movie DVDs, and software sold in China are pirated."). *But see* Peter K. Yu, *Still Dissatisfied After All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility*, 34 GA. J. INT'L & COMP. L. 143, 145 (2005-06) [hereinafter Yu, *Still Dissatisfied*] (challenging accuracy of reported software piracy rate).

9. *See* Yu, *Still Dissatisfied*, *supra* note 8, at 155 (arguing it is wrong to focus only on Beijing's lack of political will); *see also* Yonehara, *supra* note 8, at 82 (concluding that China is too decentralized for Beijing alone to control).

10. LEK, THE COST OF MOVIE PIRACY 7 (2006), http://www.mpaa.org/2006_05_03leksumm.pdf (charting revenue lost in international film markets from internet and hard copy film piracy); *see also* *China Piracy Costs Film Industry \$2.7 Bln in 2005*, REUTERS NEWS SERVICE, June 19, 2006, http://www.boston.com/ae/media/articles/2006/06/19/china_piracy_costs_film_industry_27_bln_in_2005 [hereinafter *China Piracy Costs*] (referring to LEK report finding that Chinese film piracy in 2005 cost major U.S. studios \$565 million in overall consumer spending loss). Consumer spending loss includes losses incurred by "producers, distributors, theaters, video stores and pay-per-view providers." *See* LEK, *supra* at 10. Interestingly, the markets where the U.S. film industry experienced the greatest revenue loss in 2005 were Mexico (\$483 million), the United Kingdom (\$406 million), and France (\$322 million); China actually ranked sixth overall at \$244 million. *See id.* at 7. Yet the United Kingdom and France did not even make the top ten for highest film piracy rates (Mexico ranked sixth, though far below China). *See id.* at 6. To explain the discrepancy, Mexico, the United Kingdom, and France all possess freer markets than China, resulting in higher potential revenue for the U.S. film industry. *See id.* at 8. China places a number of restrictions on its film market. *See id.* For example, China "limits the number of foreign films allowed in theaters each year to 20, and imposes a number of restrictions on the distribution of home video

This Comment will discuss the current state of film piracy in China and analyze possible U.S. responses. Section II reviews China's copyright laws, its WTO obligations, the level of film piracy in China, and reasons for piracy's success there.¹¹ Section III analyzes three possible responses to Chinese film piracy.¹² Finally, Section IV proposes a solution to the problem of Chinese film piracy.¹³

II. BACKGROUND: THE STATUS QUO OF CHINESE PIRACY

The current state of Chinese piracy presents a fairly bleak picture for Hollywood.¹⁴ Despite China's WTO membership, its updated copyright laws, and its general assurances of combating piracy, film piracy in the form of optical discs, video compact discs ("VCDs") and DVDs, is still rampant in the country.¹⁵

A. Chinese Copyright Laws

China established its original Copyright Law in 1990.¹⁶ The Copyright Law was later amended to conform to the Berne Convention.¹⁷ Finally, in 2001 the Copyright Law was revised to comply

products." *Id.* These restrictions lower the potential revenue gain for the U.S. film industry. *See id.* Consequently, U.S. film industry losses in China from film piracy are lower when compared to less restrictive countries that provide higher potential revenue gain. *See id.* Pirates, however, can easily operate around these restrictions. *See id.*

11. For a further discussion of China's copyright statutes and reasons explaining why film piracy is rampant in China, see *infra* notes 14-101 and accompanying text.

12. For a further discussion of three possible solutions to combat film piracy in China, see *infra* notes 102-243 and accompanying text.

13. For a further discussion arguing that only Beijing can effectively curb film piracy in China, see *infra* notes 244-63 and accompanying text.

14. See INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2006 SPECIAL 301 REPORT: PEOPLE'S REPUBLIC OF CHINA 112 (2006), <http://www.iipa.com/rbc/2006/2006SPEC301PRC.pdf> [hereinafter IIPA, 2006 REPORT] (noting that Chinese "piracy rates of physical copyright products remain virtually the highest in the world . . .").

15. See Yonehara, *supra* note 8, at 68 (describing nature and threat of optical disc piracy). This Comment acknowledges the emerging problem of *Internet* film piracy in China but will focus on optical disc film piracy, namely DVDs and video compact discs ("VCDs") that is currently the most prevalent form of Chinese film piracy. See CENTER FOR AMERICAN ECONOMIC STUDIES, INSTITUTE OF WORLD ECONOMICS & POLITICS, CHINESE ACADEMY OF SOCIAL SCIENCES, STUDY OF THE IMPACT OF MOVIE PIRACY ON CHINA'S ECONOMY 2 (2006), https://www.uschina.org/public/documents/2006/07/cass_piracyimpact_e.pdf [hereinafter IMPACT OF MOVIE PIRACY ON CHINA] (distinguishing three main sources of Chinese film piracy).

16. See Priest, *supra* note 8, at 808 (noting establishment of China's first Copyright Law). For a further discussion of China's Copyright Law, see *infra* notes 28-34 and accompanying text.

17. See Julia Cheng, *China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT'L L.J. 1941, 1951-52 (1998)

with the TRIPS sections (as required by the WTO) on copyright.¹⁸ Many commentators attribute the strengthened Chinese copyright laws (and IP laws in general) directly to China's 2001 WTO membership.¹⁹

1. *The Berne Convention*

The Berne Convention of 1886 pioneered the international protection of copyright by creating a coalition of nations that respected the literary and artistic rights of each member nation.²⁰ The Berne Convention also required its signatories to protect certain economic and moral rights.²¹ The protection afforded to the copyright holder is fifty years (beyond the author's life) or fifty years from publication if the identity of the author is unknown.²²

(discussing promulgation of "Regulations on the Implementations of the International Copyright Treaties" and "Implementing Rules for the Copyright Law of the People's Republic of China" to address gaps between original Copyright Law and Berne Convention). Prior to the amendments, the Copyright Law did not protect copyright owners in "films, sound recordings, and musical works right to public performances" *See id.* at 1952 n.79.

18. *See* CHING CHEONG & CHING HUNG YEE, HANDBOOK ON CHINA'S WTO ACCESSION AND ITS IMPACTS 132 (World Scientific 2003) (outlining conformity between China's Copyright Law and TRIPS); *see also* Heiberg, *supra* note 6, at 228 (mentioning China's amended Copyright Law, which improved its copyright protection by punishing violations more severely and providing broader protection).

19. *See* Heiberg, *supra* note 6, at 229 ("[M]any commentators consider WTO membership to have been a major impetus for improvements in China's IP legislation.").

20. *See* Cheng, *supra* note 17, at 1947 ("While the Berne Convention does not govern the protection of a work in its country of origin, it requires that the work be protected without formalities outside its country of origin."). "The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works." Berne Convention for the Protection of Literary and Artistic Works art. 1, July 24, 1971, available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P82_10336 (last visited Apr. 8, 2007) [hereinafter Berne Convention].

21. *See* Cheng, *supra* note 17, at 1947 (describing signatories' obligations under Berne Convention). Economic rights include "the right to translation, reproduction, public performance, and adaptation." *Id.* at 1947 n.34. "Moral rights refer to the right to attribution and the right of integrity." *Id.* at 1947 n.35.

22. *See id.* at 1947 (discussing extent of protection required by Berne Convention). Article 7 of the Berne Convention reads:

Term of Protection:

1. Generally; 2. For cinematographic works; 3. For anonymous and pseudonymous works; 4. For photographic works and works of applied art; 5. Starting date of computation; 6. Longer terms; 7. Shorter terms; 8. Applicable law; "comparison" of terms

(1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death.

(2) However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of

2. *TRIPS*

In 1994, the General Agreement on Tariffs and Trade ("GATT") promulgated TRIPS at the end of the Uruguay Round of trade negotiations.²³ Drawn from the substantive provisions of the Berne Convention, TRIPS serves as the foundation for IP protection in the international community.²⁴ All WTO members must

the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making.

(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above-mentioned period, the term of protection applicable shall be that provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

(4) It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work.

(5) The term of protection subsequent to the death of the author and the terms provided by paragraphs (2), (3) and (4) shall run from the date of death or of the event referred to in those paragraphs, but such terms shall always be deemed to begin on the first of January of the year following the death or such event.

(6) The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.

(7) Those countries of the Union bound by the Rome Act of this Convention which grant, in their national legislation in force at the time of signature of the present Act, shorter terms of protection than those provided for in the preceding paragraphs shall have the right to maintain such terms when ratifying or acceding to the present Act.

(8) In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work.

Berne Convention, *supra* note 20, art. 7.

23. See Cheng, *supra* note 17, at 1946 (explaining origin of TRIPS).

24. See *id.* (asserting modern prominence of TRIPS in dialogue on intellectual property protection). The Berne Convention and other conventions prior to 1970 were criticized by developed nations such as the United States and Canada for ineffective enforcement provisions. See *id.* at 1948 n.44. Unlike the Berne Convention, TRIPS extends protection to computer programs and data compilations. See *id.* at 1949. TRIPS also protects neighboring rights, such as "broadcasts, sound recordings and performance art." *Id.* at 1949-50. Neighboring rights generally refer to the rights of the following: performers in their performances, phonograms producers in their phonograms, and broadcasting organizations in their radio and television programs. See *id.* at 1949 n.54. TRIPS also mandates proper enforcement of intellectual property ("IP") rights and sets forth guidelines for dispute resolution. See *id.* at 1950. Further, WTO members under TRIPS "should accord . . . most favored-nation treatment to works created by other member countries."

comply with TRIPS.²⁵ “A key feature of TRIPS is the obligation it places on WTO members to adequately and effectively *enforce* intellectual property rights, including copyright (Section III of TRIPS, Articles 41-61).”²⁶ Articles 41 through 61 serve to evaluate a WTO member’s ability to combat copyright piracy.²⁷

3. *China’s Copyright Law*

China’s National People’s Congress (“NPC”) passed the country’s first statute governing copyrights, entitled the Copyright Law, in 1990.²⁸ In addition to recognizing both the economic and moral rights of individuals, the Copyright Law also reaffirmed Beijing’s

Id. at 1950-51. Thus, notwithstanding some exceptions, “any advantage, favour, privilege or immunity granted by a [WTO] member [state] to any other country shall be accorded immediately and unconditionally [to all other WTO member states].” FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, ANNEX 1C: AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS 322 (1994), http://www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter TRIPS Document] (articulating most-favored-nation treatment standard under TRIPS).

25. See CHING & CHING, *supra* note 18, at 125 (discussing why China must comply with TRIPS as WTO member nation).

26. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, COPYRIGHT ENFORCEMENT UNDER THE TRIPS AGREEMENT 1 (2004), http://www.iipa.com/rbi/2004_Oct19_TRIPS.pdf [hereinafter IIPA TRIPS] (distinguishing TRIPS from previous international IP agreements such as Berne Convention).

27. See *id.* at 1-2 (detailing obligations of WTO members under TRIPS). The TRIPS enforcement standards require a WTO member nation to provide:

(1) effective action against infringements, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements (Article 41.1); (2) procedures that are fair and equitable, are not unnecessarily complicated or costly, and do not entail any unreasonable time limits or unwarranted delays (Article 41.2); (3) transparency in the form of written decisions on the merits, made available to the parties to a proceeding without undue delay (Article 41.3); (4) adequate civil or administrative procedures and remedies, including the availability of civil injunctions (Article 44); the disposal or destruction of pirate goods (Article 46); and the disposal or destruction of materials and implements the predominant use of which has been in the creation of the infringing goods (Article 46); (5) provisional measures, including the availability of *ex parte* civil search orders (Article 50); (6) adequate border measures, such as applications to “suspend” the release of infringing goods at the border (Articles 51 and 52); and the disposal or destruction of infringing goods (Article 59); and (7) adequate criminal procedures, including deterrent penalties (Article 61); the availability of seizure, forfeiture and destruction of infringing goods (Article 61); seizure, forfeiture and destruction of materials and implements the predominant use of which has been in the commission of the offense (Article 61).

Id. at 2.

28. See Priest, *supra* note 8, at 808. The 1990 Copyright Law was established “after a decade of intense internal debate over the appropriateness of intellectual property in a socialist system” *Id.*

substantial role in regulating the country's copyright policy.²⁹ As a result, the original Copyright Law did not conform to international standards, particularly in its "broad exceptions for use by government actors, including radio and television stations."³⁰

In the late 1990s, China's promising economic future and its desire to join the WTO, which sets minimum IP standards through TRIPS, prompted the NPC to significantly amend the Copyright Law.³¹ The result was the 2001 Copyright Law, which attempted to satisfy the TRIPS requirements and address the emerging challenges imposed by new technologies.³² Most commentators believe the 2001 Copyright Law succeeded in conforming to general international provisions on its face.³³ For example, unlike the 1990 version which provided for generic economic rights, the new version created thirteen specific categories of economic rights.³⁴

29. *See id.* (noting socialist influence in China's first copyright statute).

30. *Id.* China's weak enforcement of the Copyright Law resulted in U.S. threats to impose economic sanctions and initiate a trade war during the 1990s. *See id.* at 809.

31. *See id.* at 810 (discussing reasons for changes to Copyright Law).

32. *See id.* at 811 (stating aims of 2001 Copyright Law).

33. *See Priest, supra* note 8, at 811 (conveying general consensus on success of China's copyright statute reforms). *But see* IIPA, 2006 REPORT, *supra* note 14, at 111 (arguing enforcement procedures under China's Criminal Law have yet to conform with TRIPS).

34. *See Priest, supra* note 8, at 811 (distinguishing 1990 and 2001 versions of Copyright Law). The new economic right categories include "reproduction, distribution, rental, exhibition, performance, screening, broadcasting, making cinematographic works, and communication through an information network." *Id.* Overall, the 2001 Copyright law enumerates seventeen general categories of rights. Copyright Law (promulgated by the Standing Comm. Nat'l Sept. 7, 1990, amended by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Oct. 27, 2001) (P.R.C.), translation available at <http://www.npc.gov.cn/zgrdw/english/news/newsDetail.jsp?id=2204&articleId=345014>. Article 10 of the 2001 Copyright Law reads:

Copyright includes the following personal rights and property rights:

- (1) the right of publication, that is, the right to decide whether to make a work available to the public;
- (2) the right of authorship, that is, the right to claim authorship in respect of, and to have the author's name mentioned in connection with, a work;
- (3) the right of revision, that is, the right to revise or authorize others to revise a work;
- (4) the right of integrity, that is, the right to protect a work against distortion and mutilation;
- (5) the right of reproduction, that is, the right to produce one or more copies of a work by printing, photocopying, lithographing, making a sound recording or video recording, duplicating a recording, or duplicating a photographic work, or by other means;
- (6) the right of distribution, that is, the right to provide the original copy or reproductions of a work to the public by selling or donating;

B. China's Failure to Comply with TRIPS

Although China has been a WTO member since 2001, it has not yet satisfied the TRIPS requirements on copyright enforcement.³⁵ Because the framework of its current Copyright Law is based on TRIPS, China is essentially in violation of both its WTO

(7) the right of rental, that is, the right to authorize others to use temporarily a cinematographic work or a work created by a process analogous to cinematography, or computer software, except where the software itself is not the essential object of the rental;

(8) the right of exhibition, that is, the right to publicly display the original copy or reproductions of a work of the fine arts or of a photographic work;

(9) the right of performance, that is, the right to publicly perform a work, and to publicly communicate the performance of a work by any means or process;

(10) the right of presentation, that is, the right to publicly present a work of the fine arts, a photographic work, a cinematographic work, a work created by a process analogous to cinematography, or other works, by projector, slide projector or any other technology or instrument;

(11) the right of broadcasting, that is, the right to broadcast a work or disseminate it to the public by any wireless means, to communicate the broadcast of a work to the public by wire or by rebroadcasting, and to publicly communicate the broadcast of a work by loudspeaker or any other analogous instrument transmitting signs, sounds or images;

(12) the right of communication through information network, that is, the right to make a work available to the public by wire or by wireless means, so that people may have access to the work from a place and at a time individually chosen by them;

(13) the right of cinematography, that is, the right to fix an adaptation of a work in a medium by cinematography or a process analogous to cinematography;

(14) the right of adaptation, that is, the right to change a work into a new one with originality;

(15) the right of translation, that is, the right to change the language in which the work is written into another language;

(16) the right of compilation, that is, the right to compile by selection or arrangement preexisting works or passages therefrom into a new work; and

(17) other rights to be enjoyed by copyright owners.

...

Id.

35. See *China: Request for Public Comment on Out-of-Cycle Review of the People's Republic of China Before the Section 301 Comm.* (Statement of Eric H. Smith, President, International Intellectual Property Alliance), 69 Fed. Reg. 74,561 (Dec. 14, 2004) available at http://www.iipa.com/rbc/2005/CHINA%202005_Feb9_PRC_OCR_Submission.pdf [hereinafter *Smith, China*] (asserting China's failure to meet its WTO/TRIPS obligations); see also Stacey H. Wang, *Great Olympics, New China: Intellectual Property Enforcement Steps Up to the Mark*, 27 LOY. L.A. INT'L & COMP. L. REV. 291, 291 (2005) (asserting that IP enforcement procedures in post-WTO China are largely ineffective). China has also failed to comply with TRIPS Article 50. See *Smith, supra*, at 13. Article 50 deals mostly with *ex parte* civil search orders and works in conjunction with Article 41. See IIPA TRIPS, *supra* note 26, at 3 (parsing Article 41).

obligations and its own statutes.³⁶ In particular, the Chinese are not observing TRIPS Articles 41 and 61.³⁷

1. *Article 41*

Matthijs Geuze, former Secretary to the TRIPS Council at the WTO, described six “performance standards” for Article 41,³⁸ which lists the general criteria of IP enforcement by WTO member nations.³⁹ The key to the performance standards is the WTO mem-

36. See Yonehara, *supra* note 8, at 70-71 (demonstrating similarities between China's Copyright Law, Berne Convention, and TRIPS).

37. See Smith, *China*, *supra* note 35, at 13 (concluding that China fails to fulfill its WTO/TRIPS enforcement requirements).

38. TRIPS Document, *supra* note 24, at 338 (setting forth general obligations to enforce IP rights). Article 41 reads:

1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

Id.

39. See IIPA TRIPS, *supra* note 26, at 2 (suggesting developing countries make changes based on Geuze's “performance standards”). The six performances standards are:

(1) enforcement procedures to permit effective action against infringement; (2) expeditious remedies to prevent infringements; (3) deterrence to further infringements; (4) enforcement procedures that are not unreasonably complicated; (5) enforcement procedures that are not unreasonably costly; (6) time limits that do not cause unwarranted delays or are not unreasonably fast.

Id.

ber's ability to deter future infringements.⁴⁰ A "clear-cut test[]" for determining whether the member nation satisfies Article 41 is whether there was a "change over time of the piracy level."⁴¹ Numerous reports indicate that China has failed this "clear-cut test."⁴² For example, a 2001 review by the International Intellectual Property Alliance ("IIPA") found that China's film piracy level in 2000 was ninety percent (up from seventy-five percent in 1997).⁴³ Five years later, China's film piracy level actually increased slightly to ninety-three percent.⁴⁴ The IIPA attributes the high level of piracy to "lack of real deterrence due to low administrative penalties and virtually nonexistent criminal prosecutions for major acts of piracy."⁴⁵

40. See *id.* at 3 (stating most important consideration of Article 41).

41. *Id.* at 3-4 ("One of the most clear-cut tests is the change over time of the piracy level."). The International Intellectual Property Alliance notes, for example, that a rise of piracy in countries that already have piracy levels of fifty percent or higher is a clear indication that deterrence measures are ineffective. See *id.*

42. For a further discussion of China's failure to comply with Article 41, see *infra* notes 43-45 and accompanying text.

43. See INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2001 SPECIAL 301 REPORT: PEOPLE'S REPUBLIC OF CHINA 26 (2001), available at <http://www.iipa.com/rbc/2001/2001SPEC301CHINA.pdf> [hereinafter IIPA, 2001 REPORT] (comparing estimated trade losses due to piracy from 1995 to 2000 in China). The IIPA, a coalition of six trade associations formed in 1984, has represented U.S. copyright-based industries in efforts to protect copyrighted materials within the international community. See *Smith, China*, *supra* note 35, at 1. These member associations represent approximately 1,500 U.S. companies producing and distributing copyrighted materials. See *id.*

44. See INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2007 SPECIAL 301 REPORT: PEOPLE'S REPUBLIC OF CHINA (PRC) 96 (2007), <http://www.iipa.com/rbc/2007/2007SPEC301PRC.pdf> [hereinafter IIPA, 2007 REPORT] (comparing estimated trade losses due to piracy from 2002 to 2006 in China). The IIPA's methodology for the 2005 data was "based on the percentage of potential market lost to piracy. Calculations involve revenue losses, legitimate market sizes, and potential legitimate markets without piracy." INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 2007 SPECIAL 301 REPORT: PEOPLE'S REPUBLIC OF CHINA APPENDIX B, 3 (2007), <http://www.iipa.com/pdf/2007spec301methodology.pdf> (explaining methodology behind 2005 data). The IIPA's methodology for determining piracy data prior to 2005 was estimated using a variety of different methods. See *id.* at 3-4. In another film piracy study, which was prepared for the MPAA by LEK Consulting, an international strategy consulting firm, the film piracy rate in China was calculated to be ninety percent in 2005. See LEK, *supra* note 10, at 6 (comparing 2005 country piracy rates). LEK calculated piracy rates for each country based on the following:

Piracy rates are derived from MPA member company legitimate revenue plus estimated revenue lost to piracy in each market. They are a static snapshot of the percentage of the potential market that is lost due to piracy. The piracy rate is based on existing market data and does not incorporate growth if piracy did not exist.

Id. Russia and Thailand each experienced seventy-nine percent. See *id.*

45. IIPA, 2001 REPORT, *supra* note 43, at 24 (emphasizing China's weak anti-piracy measures).

2. *Article 61*

Article 61 requires WTO members to provide criminal procedures and punishments for willful copyright piracy cases.⁴⁶ Specifically, the WTO member must use effective criminal enforcement procedures against copyright piracy “‘on a commercial scale.’”⁴⁷ Thus, imprisonment and fines must be significant enough to deter future piracy.⁴⁸ WTO members must also seize and completely destroy infringing goods.⁴⁹

China has failed to comply with Article 61 on two grounds. First, China has not provided effective criminal penalties for pirates.⁵⁰ Administrative penalties, rather than judicial sanctions,

46. See IIPA TRIPS, *supra* note 26, at 4 (parsing Article 61). Article 61 also pertains to willful trademark violations. *See id.* “Effective criminal enforcement has two major elements: (a) effective searches and seizures of pirate product by the police without notice to the infringer (raids), and (b) the existence in statutory law of deterrent criminal penalties and, in combination with Article 41, their imposition in practice (Article 61).” *Id.* Article 61 reads:

Members shall provide for criminal procedures and penalties to be applied at least in cases of willful [sic] trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully [sic] and on a commercial scale.

TRIPS Document, *supra* note 24, at 345.

47. IIPA TRIPS, *supra* note 26, at 4 (noting important stipulation of Article 61). “[O]n a commercial scale” implicates an objective standard that encompasses whether the infringing act has “significant commercial ramifications to rightholders.” *Id.* Thus, the standard would not be met if the WTO member merely criminalized the sale or distribution of pirated products. *See id.* Instead, the WTO member must also criminalize piracy by legitimate companies. *See id.* For example, the unlicensed copying of business software within a corporate environment is also piracy on a commercial scale because such acts will impact the software market. *See id.* Further, even a nonprofit act, such as uploading software files onto a website for free downloading, can have “a severe ‘commercial’ impact of significant ‘scale’ and therefore such act must be made subject to criminal penalties.” *Id.*

48. *See id.* (noting Article 61 requirement). “The ‘deterrent’ effect of imprisonment and fines can be objectively determined by piracy levels.” *Id.* Fines are “simply a cost of doing business for the pirate,” rather than a deterrent, if they are too low. *Id.*

49. *See id.* (reasoning that low fines and failure to destroy pirated goods will not likely reduce piracy levels).

50. *See* IMPACT OF MOVIE PIRACY ON CHINA, *supra* note 15, at 50 (noting insignificant judicial penalties for piracy).

serve as the primary deterrent against copyright piracy.⁵¹ The lack of judicial enforcement, which includes the more effective deterrent of imprisonment, creates a significant problem because administrative enforcements generally involve negligible fines.⁵²

Second, Articles 217 and 218 of China's Criminal Law do not comply with Article 61 as they fail to encompass all forms of commercial piracy.⁵³ China is one of few countries that prosecutes copyright infringement only when there is a "profit" purpose.⁵⁴

51. *See id.* at 49 (stating administrative penalties comprised eighty-two percent of copyright violations in 2004). "[A]dministrative punishment includes bans, shutdowns, warnings, fines, suspensions of production and operation, confiscations and revocations of business licenses." *Id.* But judicial penalties, which are required under Article 61, make up a far smaller percentage. *See id.* In 2004, judicial punishments accounted for just one percent of the 9,691 cases accepted. *See id.* at 50. Another example illustrating Beijing's preference for administrative measures was the decision by the Chinese government in March 2006 to take administrative action against fourteen optical disc ("OD") factories. *See* IIPA, 2007 REPORT, *supra* note 44, at 100. While some of the plants were closed and others suspended, "no criminal cases have been commenced" despite the high pirate production levels at the factories. *Id.*

52. *See* IIPA, 2006 REPORT, *supra* note 14, at 117-18 (describing ineffective nature of administrative enforcements). Because pirate producers know that most administrative raids will not be transferred for judicial prosecution, they can operate "in the open without fear of effective enforcement action, much less effective criminal enforcement." *Id.* The lack of judicial enforcement is also responsible for the continued presence of "large-scale pirate production" of films by Chinese OD factories. IIPA, 2007 REPORT, *supra* note 44, at 97. According to the IIPA:

Exports sourced from these factories continue to be seized around the world. The quality of the pirate product being produced and exported in large quantities by Chinese OD plants is some of the best being found by authorities in other countries. The continued lack of criminal prosecutions and the lack of deterrence in administrative enforcement in China ensures that piracy rates of physical copyright products continues to be among the highest in the world, at 85-95% depending on the industry sector and product format (e.g., an estimated 95% of DVDs in China are pirate).

Id.

53. *See* IIPA, 2006 REPORT, *supra* note 14, at 124 (conveying deficiency in China's Criminal Law). Articles 217 and 218 of China's Criminal Law pertain to piracy. *See id.*

54. *See id.* (noting key stipulation of China's Criminal Law). "China should remove the 'purpose of reaping profits' standard since commercial scale piracy can be, and in the digital age often is, engaged in without any purpose of reaping profit (e.g., on a P2P Internet site where no money is exchanged)." *Id.* Articles 217 and 218 of the Criminal Law read:

Any of the following categories of persons who infringes upon copyright for the purpose of reaping profits shall, if the amount of illegal gains is relatively huge or other serious circumstances exist, be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and concurrently or independently be sentenced to a fine. If the amount of illegal gains is huge or other especially serious circumstances exist, the offender shall be sentenced to fixed-term imprisonment of not less than three years and not more than seven years, and concurrently be sentenced to a fine:

Further, China is the only country that sets a minimum threshold for criminal liability “calculated based on pirate profits or income.”⁵⁵ This loophole allows many commercial scale piracy entities to avoid criminal prosecution.⁵⁶

C. Why Film Piracy Flourishes in China

Despite China’s official commitments to reduce piracy levels, copyright violations for all IP products have remained virtually unchanged.⁵⁷ Many commentators have previously discussed the enormity of China’s piracy problem.⁵⁸ Rather than reiterate this discussion, this Section will instead develop and explain the pertinent factors behind Chinese film piracy’s success.

(1) reproducing and distributing, without the permission of the copyright owner, his written works, musical works, cinematic works, television works, video works, computer software and other works;

(2) publishing a book of which another person has the exclusive publishing right;

(3) reproducing and distributing, without the permission of the phonogram or videogram producer, the phonogram or videogram produced by him; or

(4) producing and selling a work of art bearing the forged signature of another person.

Whoever sells, for the purpose of reaping profits, those which he well knows are infringing reproductions specified in Article 217 of this Law shall, if the amount of his illegal gains is huge, be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and concurrently or independently be sentenced to a fine.

XING FA [Criminal Code] arts. 217-18 (amended by the Standing Comm. Nat’l People’s Cong., Dec. 25, 1999, effective Dec. 25, 1999) (P.R.C.), *translation available at* http://www.chinalaw.gov.cn/jsp/jalor_en/disptext.jsp?recno=1&&ttlrec=83#10. China is also the only country in the world “requiring more than ‘reasonable suspicion’ that a crime . . . [is] being committed before commencing an investigation.” IIPA, 2007 REPORT, *supra* note 44, at 100. “Unless China shows an open willingness to bring criminal cases against major pirates in their country, there is little hope that levels of piracy can be significantly reduced, despite repeated Chinese government promises. *Id.*

55. IIPA, 2006 REPORT, *supra* note 14, at 124 (illustrating that pirates may only be prosecuted “‘when the amount of the illicit income is huge’” or “‘gains a fairly large amount’” of income from piracy).

56. *See id.* (analyzing effects of unique criminal liability threshold).

57. *See Smith, China, supra* note 35, at 12 (highlighting lack of decline in piracy levels).

58. *See Yu, Still Dissatisfied, supra* note 8, at 144 (observing that China’s piracy problems are well documented).

1. *Motivations Behind Chinese Purveyance of Pirated Films*

Access,⁵⁹ price,⁶⁰ and quality⁶¹ all play a role in why Chinese consumers willingly contribute to film piracy's success. Any strategy designed to successfully combat Chinese film piracy must arguably acknowledge and address these three factors.

a. Chinese Restrictions on Foreign Films

China currently allows only twenty foreign films to be featured in Chinese theaters each year.⁶² In addition, foreign films are barred from cinemas during holidays and other peak periods (blackout periods).⁶³ So unlike their American counterparts, Chinese consumers cannot go to local theaters to watch the latest Hollywood blockbusters because of the governmental restrictions.⁶⁴

59. For a further discussion of Chinese consumer access to foreign films, see *infra* notes 62-70 and accompanying text.

60. For a further discussion of the economic factor in film piracy, see *infra* notes 72-73 and accompanying text.

61. For a further discussion of the quality of pirated optical discs, see *infra* notes 74-85 and accompanying text.

62. See LEK, *supra* note 10, at 8 (detailing Chinese restrictions on foreign films). The twenty foreign films allowed into theaters are imported under a "full revenue-sharing" arrangement. See IMPACT OF MOVIE PIRACY ON CHINA, *supra* note 15, at 14 (discussing Chinese foreign film restriction). Additional films may be imported, but they are encumbered by high royalties and duties. See *id.* In 2003, China imported forty foreign films for theatrical distribution. See *id.* at 20. "To avoid the quota, the blackouts and the tiny share of the box-office receipts, U.S. filmmakers can team up with a Chinese production company." Editorial, *Unveiling China's Past*, L.A. TIMES, Dec. 21, 2006, available at http://www.latimes.com/news/printedition/asection/la-ed-veil21dec21,1,425681.story?coll=la-news-a_section. For example, the makers of *The Painted Veil* worked with a Chinese joint venture company. See *id.* The partnership allowed *The Painted Veil* to be regulated as a domestic film:

Doing so gave them the same benefits enjoyed by Chinese filmmakers, including guaranteed access to the fast-growing Chinese theatrical market. But it also meant that their script would have to be approved by the Chinese film bureau, as would the final version of the movie. In other words, because the movie producers wanted access to Chinese movie screens, they allowed communist censors to control content destined to be seen by audiences around the world.

Id.

63. See Audra Ang, *6 U.S. Movie Studios Sue Beijing Shops for Selling Unlicensed Copies of Movies*, ASSOCIATED PRESS, Sept. 13, 2006, <http://famulus.msnbc.com/famulusgen/ap09-13-064116.asp?t=APCOM> (noting Chinese restrictions on theatrical releases of foreign films); see also Heiberg, *supra* note 6, at 236 (explaining "blackout periods" are when Chinese theaters may not show foreign films). In 2004, China banned summer blockbusters such as *Spider-Man 2*, *Harry Potter and the Prisoner of Azkaban*, and *Shrek 2*. See *id.* at 237. China claimed it was initiating a "crackdown on bad influences," though some observers speculated that the blackouts were designed to protect China's own film industry. See *id.*

64. See Heiberg, *supra* note 6, at 257 (describing disincentive for piracy where legitimate film options are readily available to consumers); see also Josh Grossberg,

These restrictions are a tremendous “boon” to film pirates, who essentially have a market monopoly on the restricted foreign films until the legitimate DVD release.⁶⁵ As MPAA lawyer Frank Rittman explained, the lack of access to legitimate film products naturally motivates Chinese consumers to pursue the more accessible pirated products.⁶⁶

As a further constraint, each of the twenty foreign films must first “undergo a lengthy review and censorship process,” which often means the film will not be released until months after its debut in other countries.⁶⁷ China also imposes both a lengthy review

China Whacks The Departed, E! ONLINE, Jan. 17, 2007, <http://www.eonline.com/news/article/index.jsp?uuiid=d7428fe3-03d2-4f41-a167-f54e8fa79af1> [hereinafter Grossberg, *The Departed*] (discussing China’s decision to block Martin Scorsese’s *The Departed* from Chinese theaters). Besides the twenty film quota, Chinese officials sometimes block a film for inappropriate material. *See id.* China banned the *The Departed* from its theaters because of a scene where Beijing’s agents bought advanced military computer hardware from the Boston mafia. *See id.* Besides being politically sensitive, the scene also included a remark about China being the U.S.’s main adversary. *See id.* But see Josh Grossberg, *007: From China with Love*, E! ONLINE, Nov. 16, 2006, <http://www.eonline.com/news/article/index.jsp?uuiid=e115802d-7ab6-4982-962f-49b6a7474b0f> (discussing China’s decision to allow *Casino Royale* in Chinese theaters). “Chinese censors have approved the release of *Casino Royale*, the 21st film based on Ian Fleming’s famed superspy, marking the first time a James Bond adventure will unspool in mainland theaters.” *Id.* China’s censors generally ban Western films that are particularly sexual, violent, or political. *See id.* While the censors did not ban *Casino Royale*, the film’s theatrical release in China was postponed from November 17, 2006 to January 30, 2007 because of a blackout period. *See id.*

65. *See* Ang, *supra* note 63 (“The delay is a boon to thriving film pirates, who can flood the market with millions of illegal copies of a foreign movie just days after it is released abroad.”); *see also* ERIC H. SMITH, CHINA WTO: COMMENTS REGARDING COPYRIGHT PROTECTION AND SERVICES/MARKET ACCESS IN CHINA IN RESPONSE TO THE REQUEST FOR COMMENTS AND NOTICE OF PUBLIC HEARING CONCERNING CHINA’S COMPLIANCE WITH WTO COMMITMENTS, 69 FED. REG. 45,369 (July 29, 2004), http://www.iipa.com/rbi/2004_Oct12_IIPA_CHINA_WTO_TPSC_Submission-rev.pdf (“[T]o allow in . . . 20 films annually under standard commercial terms (revenue sharing) essentially provide[s] pirates with a monopoly in the Chinese market for the six-month period between theatrical release of a motion picture and the release of the product in home video formats.”).

66. *See* Ang, *supra* note 63 (observing reason for Chinese purveyance of pirated films). After China banned *The Departed* from its theaters, Chinese consumers were forced to resort to pirated versions of the film. *See* Grossberg, *The Departed*, *supra* note 63 (“[G]iven China’s booming black market for pirated Hollywood DVDs, it’s doubtful the ban will prevent mainland residents from checking out the crime saga if they really choose to do so.”). *The Departed*, however, was released in Hong Kong and Taiwan theaters. *See* Release Dates for *The Departed* (2006), <http://www.imdb.com/title/tt0407887/releaseinfo> (last visited Apr. 8, 2007) (listing release dates for *The Departed*).

67. Heiberg, *supra* note 6, at 234 (discussing effects of Chinese censorship process).

process and a ten percent tariff on home video titles.⁶⁸ These restrictions in turn encourage the average Chinese consumer to turn to the film piracy industry, which is unaffected by delays, quotas, and tariffs.⁶⁹ Not surprisingly, the combination of these restrictive factors has led to a flourishing film piracy industry.⁷⁰

b. Chinese Buying Power and the Quality of Pirated Films

While some observers attribute Chinese copyright infringement to Chinese culture,⁷¹ the piracy problem may actually reflect simple economics.⁷² The average Chinese worker earning about \$100 per month will prefer a one dollar pirated DVD over a legiti-

68. *See id.* at 235 (comparing restrictions on home video titles to restrictions on theatrical releases). China imports considerably more home videos than theatrical releases. *See id.* at 234. "Between 1997 and 2000, China's Ministry of Culture approved the import of over 800 home video titles (averaging 200 per year)." *Id.* at 234-35.

69. *See id.* at 237 (asserting that most Chinese consumers prefer cheaper and newer titles to waiting for expensive legitimate versions).

70. *See id.* (noting MPAA's concern regarding slow censorship process). The MPAA has argued that the "combination of the twenty film quota, the slow censorship process, . . . the blackout periods, and the tariffs . . . [have] created a piracy market" *Id.*

71. *See* Yonehara, *supra* note 8, at 74-78 (discussing how Chinese cultural predispositions conflict with copyright enforcement); *see also* Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 16-21 (2001) [hereinafter Yu, *Shakespeare*] (explaining how IP rights contradict traditional Chinese moral standards). Three cultural aspects particularly influence Chinese attitude towards copyright infringement. *See* Yonehara, *supra* note 8, at 75 (specifying how different aspects of Chinese culture influence piracy). First is equality among classes, which has a long tradition in Chinese history. *See id.* The idea of copyright licensing and royalties contradicts the equity notion because it is "viewed as a profit-making venture for authors." *Id.* at 76. Second, Chinese culture encourages non-competition. *See id.* Thus, the Chinese do not react well to threats of trade sanctions over its copyright violations. *See id.* at 76-77. Finally, the Chinese promote and adhere to the idea "of state control over the individual." *Id.* at 77. Consequently, the notion that an expressed idea can be owned by one person, as opposed to the state as a whole, contradicts Chinese ideals. *See id.* In addition, the Chinese believe the past embodies cultural and social values. *See* Yu, *Shakespeare*, *supra* at 16 (contrasting Confucianism with modern property rights). "By encountering the past, one could understand the Way of Heaven, obtain guidance to future behavior, and find out the ultimate meaning of human existence." *Id.* at 16-17. IP rights contradict this Chinese ideal because they allow "a significant few to monopolize these needed materials, they prevent the vast majority from understanding their life, culture, and society." *Id.* at 17.

72. *See* Priest, *supra* note 8, at 828 (speculating that copyright enforcement in China will improve once economic conditions improve). "Most foreigners think copyright infringement has to do with Chinese culture or philosophy, but it's really an economic problem. People want to buy the *daoban* [pirated] VCDs or DVDs because they are cheap." *Id.* (quoting Chinese intellectual property attorney).

mate DVD costing ten to fifteen dollars.⁷³ Yet while the growing middle and upper class in China can afford legitimate products, they might choose to purchase the legitimate products if such products “represent a significant upgrade in features and quality”⁷⁴

Unfortunately for the MPAA studios, the quality of pirated DVDs and VCDs in recent years has increased substantially, to the point of being “indistinguishable from the real thing.”⁷⁵ Further, the pirated DVDs are often available just days after the film’s theatrical release and long before the home video release.⁷⁶ For example, *Star Wars: Episode III - Revenge of the Sith* was released in U.S. theaters on May 19, 2005.⁷⁷ Yet pirated DVDs were available on Beijing streets “a few days later for the typical price of 8 *yuan* (a little under one U.S. dollar).”⁷⁸

Generally, most pirated DVDs sold soon after the film’s theatrical release are of poor quality.⁷⁹ But *Star Wars: Episode III - Revenge of the Sith* and other blockbuster films may feature improved qual-

73. See *id.* (commenting on Chinese preference for cheaper products); see also Yu, *Still Dissatisfied*, *supra* note 8, at 153 (discussing how economic factors influence Chinese IP piracy). The Chinese have very limited disposable income. See *id.*

74. Priest, *supra* note 8, at 828.

75. *Id.* at 829 (noting pirated and legitimate DVDs are virtually identical); see also IMPACT OF MOVIE PIRACY ON CHINA, *supra* note 15, at 34 (detailing services offered to customers by pirate distributors). “[M]any small retailers provide home delivery services and even good after-sale services, allowing customers to refund or exchange disks that cannot be read.” *Id.*

76. See Ellen Sander, *The Revenge of the SITH and the Rationale of the Pirates, WOMEN OF CHINA*, available at http://www.danwei.org/ip_and_law/music_and_movie_pirates_if_you.php (last visited Mar. 8, 2007) (observing release time of pirated DVDs in Beijing); see also Alicia Chang, *Pirates Out in Force Capitalizing on ‘Sith,’* ASSOCIATED PRESS, May 23, 2005, <http://deseretnews.com/dn/view/0,1249,600136076,00.html> (reporting pirated copies of *Star Wars: Episode III* were available in Beijing just three days after its U.S. theatrical release).

77. See Release Dates for *Star Wars: Episode III – Revenge of the Sith* (2005), <http://www.imdb.com/title/tt0121766/releaseinfo> (last visited Apr. 8, 2007) (listing release dates for *Star Wars: Episode III – Revenge of the Sith*).

78. Sander, *supra* note 76 (noting film piracy of *Star Wars: Episode III* film). The Comment author was in Qingdao, Shandong province in China, about a week after the U.S. theatrical release of *Star Wars: Episode III – Revenge of the Sith* where he visited an audio/video shop selling cheap pirated DVD copies of the *Star Wars* film.

79. See Yu, *Still Dissatisfied*, *supra* note 8, at 154 (explaining why some pirated DVDs are inferior to legitimate copies). Initial pirated copies are usually made using a camcorder inside the theater:

If you get a pirated DVD around the time of the theatrical release, there is a good chance that the movie was taken using a camcorder inside a theater. The sound and visual quality is low, the images are moving around, and you can hear the conversation or laughter of people sitting nearby.

Id.

ity.⁸⁰ In the *Sith* case, the DVD was “slightly blurry but appeared not to have been filmed in a cinema, as are many of China’s imported fakes.”⁸¹

The availability of high-quality, inexpensive pirated DVDs and VCDs has compromised the competitive efforts of some MPAA

80. See Chang, *supra* note 76 (describing initial quality of pirated blockbuster films such as *Star Wars: Episode III*); see also Gwynn Guilford, *US Movie Giants Swim with China’s Sharks*, FIN. EXPRESS, Jan. 5, 2007, available at http://www.financialexpress-bd.com/index3.asp?cnd=1/5/2007§ion_id=4&newsid=48380&spcl=no (depicting different stages in quality of pirated DVDs). The author of this Comment has stayed for periods of two to ten months in four Chinese cities: Beijing (2004), Suzhou, Jiangsu province (2003), Anyang, Henan province (2002-2003) and Qingdao, Shandong province (2004-2005). The author observed the following characteristics of pirated DVDs: (1) where the film was theatrically released for over six months, the pirated DVD was nearly indistinguishable from a legitimate DVD (with the possible exception of the “special features” option); (2) where the film was theatrically released for less than six months and was not a major blockbuster, the pirated DVD was either filmed inside a theater using a camcorder or of poor quality and contained inaccurate English subtitles; (3) where the film was theatrically released for three to five months, but was a major blockbuster, the pirated DVD was of excellent quality except for the English subtitles; and (4) where the film was theatrically released for about one week, but was a major blockbuster, the pirated DVD was a copy of a stolen screener film (probably intended for film festival voters), meaning adequate but not outstanding audio and video quality (and a periodic warning flash urging the viewer to contact the FBI).

81. Chang, *supra* note 76 (noting adequate quality of *Star Wars* DVD despite some picture clarity issues and incorrect English subtitles); see also JAMES KYNGE, *CHINA SHAKES THE WORLD: A TITAN’S RISE AND TROUBLED FUTURE—AND THE CHALLENGE FOR AMERICA* 57 (Houghton Mifflin Co. 2006) (describing “systematic” operation behind film piracy in China). “Almost every time a Hollywood blockbuster was cut, it would appear on DVD in China before it had been released in the same format in America. To accomplish this, pirate networks had to have operatives under cover in the film companies that they were ripping off.” *Id.* It is generally believed that there are security leaks within the film industry, allowing insiders to sell hard copies of newly released films to pirates. See E-mail from Daniel C.K. Chow, Professor of Law, The Ohio State University Michael E. Moritz College of Law, to Oliver Ting, J.D. Candidate, 2007, Villanova University School of Law (Jan. 9, 2007, 12:42:18 EST) (on file with author) (discussing how Chinese pirates obtain original copies of Hollywood films). Most DVD productions occur outside of mainland China and are then shipped into the country, where they are mass produced and distributed. See *id.* Professor Chow worked in China for many years “while serving as in-house counsel for a multi-national enterprise with significant business operations in China and serious intellectual property piracy concerns.” Daniel C.K. Chow, *Why China Does Not Take Commercial Piracy Seriously*, 32 OHIO N.U.L. REV. 203, 203 n.1 (2006) [hereinafter Chow, *Commercial Piracy*]. In addition, Professor Chow participated in:

Numerous raids and seizures of counterfeit products by Chinese government authorities and later helped to organize the China Anti-Counterfeiting Coalition, now called the Quality Brands Protection Committee, the leading industry lobbying group in China on counterfeiting issues. [He] has continued to be actively involved in intellectual property issues in China.

Id.

members in China.⁸² For example, Warner Brothers recently decided to release the DVD and VCD versions of *Superman Returns* in China two months ahead of the United States and European release date.⁸³ The DVD was priced at fourteen *yuan*, which is just under two U.S. dollars.⁸⁴ Yet given the thriving film piracy industry, Warner Brothers was not surprised when, as the legitimate *Superman Returns* DVD debuted in China on September 28th, 2006, a “pristine bootleg version was selling in Beijing for the equivalent of \$1.25,” or fifty cents less than the legitimate DVD.⁸⁵

2. *Obstacles to a Beijing Crackdown on Film Piracy*

Even if Beijing wanted to crack down on film piracy, its influence over film pirates is limited by the growing separation of powers between Beijing and the local governments.⁸⁶ In 1979, Beijing decentralized the federal government, giving more power to local

82. See *Superman Battles China's Copyright Pirates*, AGENCE FR.-PRESSE, Sept. 28, 2006, <http://www.breitbart.com/news/na/060928105648.06nb1k0n.html> [hereinafter *Superman Battles*] (reporting on efforts by Warner Brothers to combat Chinese piracy).

83. See *id.* (describing Warner Brothers' strategy against film piracy in China). The DVD version of *Superman Returns* was released in China on September 28, 2006. See *Bootlegging Returns*, *supra* note 1 (discussing effort to fight film piracy through early DVD releases). The Chinese DVD was released roughly three months after the film's June 21, 2006 theatrical debut in the U.S. See Release Dates for *Superman Returns* (2006), <http://www.imdb.com/title/tt0348150/releaseinfo> (last visited Mar. 8, 2007) (listing worldwide release dates for *Superman Returns*). By contrast, the U.S. DVD version of *Superman Returns* was released on November 28, 2006, or about five months after the film's U.S. theatrical debut. See *Bootlegging Returns*, *supra* note 1 (reporting release date for U.S. DVD). The U.S. DVD release is more in line with the “four-month ‘window’ between cinema and DVD release that is generally accepted by the industry as the minimum.” *British Cinemas Pull Fox Film in DVD Release Row*, REUTERS NEWS SERVICE, Feb. 2, 2007, http://news.yahoo.com/s/nm/20070202/film_nm/britain_film_dvd_dc_2 (on file with author) (discussing industry standard on DVD releases). The U.S. DVD is priced at \$28.98 while the Chinese pirated DVD is priced at \$1.75. See *Bootlegging Returns*, *supra* note 1 (illustrating substantial price difference between legitimate and pirated DVDs).

84. See *Bootlegging Returns*, *supra* note 1 (stating price of pirated Warner Brothers' DVD in China).

85. See *id.* (“That doesn't surprise me . . . [b]ut at least now a consumer there has a choice of buying a legitimate copy, of higher quality and with all the extras, for not much more.” (quoting Mark Horak, executive vice president and general manager of Warner Home Video, Asia Pacific, and Latin America)). Warner Home Video is the home video unit of Warner Brothers and distributes films to ninety countries. See Warner Bros.Online: Company Info, http://www2.warnerbros.com/main/company_info/company_info.html?frompage=sitemap (last visited Apr. 8, 2007) (describing Warner Brothers' home video unit).

86. See *Atomised*, ECONOMIST, June 3, 2006, at 37 [hereinafter *Atomised*] (describing Beijing's waning control over local authorities). For example, in March 2005, Beijing issued directives aimed at cooling the housing market. See *id.* While Shanghai obediently controlled prices, other major Chinese cities continued to experience rapid housing price growth. See *id.*

and provincial governments in an effort to ease China's transition from a planned economy to a market economy.⁸⁷ Beijing's influence over local officials has declined ever since.⁸⁸

"The governing body of local jurisdiction is the Local People's Congress ("LPC")"⁸⁹ Article 101 of China's Constitution stipulates the LPC can elect and dismiss officials at the local level.⁹⁰ While these officials do report to Beijing, they are directly accountable to the local jurisdiction.⁹¹ Consequently, a local official elected by the LPC "is tempted to place local interests over state policies in making political judgments."⁹² Further, these officials are responsible for enforcing the laws passed by Beijing.⁹³

China's decentralization and the "inevitable consequence of local protectionism" have serious piracy ramifications because most IP piracy goods are manufactured in rural communities.⁹⁴ Given that piracy accounts for a considerable portion of the rural commerce, local officials may not share the same interests as central

87. See Cheng, *supra* note 17, at 1985 (explaining how China's decentralization efforts may contribute to its inability to combat piracy).

88. See *id.* (discussing inevitable result of China's decentralization). "Today, central government officials no longer dictate the decisions of local officials." *Id.*

89. See *id.* (distinguishing local jurisdictions from national government).

90. See *id.* at 1985-86 (indicating that "central authorities do not have absolute control over personnel management for the LPC"). Article 101 reads:

Local people's congresses at their respective levels elect and have the power to recall governors and deputy governors, or mayors and deputy mayors, or heads and deputy heads of counties, districts, townships and towns.

Local people's congresses at or above the county level elect, and have the power to recall, presidents of people's courts and chief procurators of people's procuratorates at the corresponding level. The election or recall of chief procurators of people's procuratorates shall be reported to the chief procurators of the people's procuratorates at the next higher level for submission to the standing committees of the people's congresses at the corresponding level for approval.

XIAN FA art. 101, § 5 (2004) (P.R.C.), translation available at <http://www.npc.gov.cn/zgrdw/english/constitution/constToDetail.jsp?id=full&pages=8> (last visited Apr. 8, 2007).

91. See Cheng, *supra* note 17, at 1986 (noting conflicting interests of local officials).

92. *Id.* at 1986 (analyzing potential conflict of interest for local official). It would behoove local officials to intervene in a court judgment against local piracy because they have to answer to the LPC regarding the judgment's negative effects on local commerce. See *id.*

93. See Priest, *supra* note 8, at 822 ("Central authorities promulgate laws and regulations, but local authorities implement those laws and regulations.").

94. Cheng, *supra* note 17, at 1985-86 (discussing consequences decentralization entails); see also Priest, *supra* note 8, at 822 (describing local protectionism's role in Chinese piracy).

authorities.⁹⁵ So Beijing may pass all the copyright laws desired by Hollywood, but the local officials, who answer primarily to the LPC, will be tempted to ignore them.⁹⁶

For example, in areas where piracy provides jobs and income to local residents and revenue to the local governments, local officials are reluctant to intervene, especially because the local administration can retaliate against them.⁹⁷ These same officials, however, can ignore Beijing's enforcement orders and not risk political repercussions so long as their areas achieve impressive economic growth and minimal social unrest.⁹⁸ As a result, enforcing laws and regulations promulgated by Beijing become merely discretionary at this level.⁹⁹ Thus, when officials in Beijing order a crackdown on piracy production sites, a few factories may close but the local officials who condoned such operations are rarely punished.¹⁰⁰ Naturally, piracy production sites in these local regions are allowed to endure.¹⁰¹

95. See Priest, *supra* note 8, at 822 (discussing conflict of interest between local and central authorities). In several rural towns, piracy literally supports the entire economy. See *id.* Local governments also can earn substantial rental income from the stalls at state-owned markets where pirated goods are sold. See *id.* at 823. Since local government officials "might have a direct or indirect interest in sustaining the trade in counterfeit goods," it is unlikely that local officials will "undertake a serious crackdown on their own initiative." Chow, *Commercial Piracy*, *supra* note 81, at 222 (indicating need for Beijing to show more initiative in curbing piracy).

96. See Priest, *supra* note 8, at 822 (describing lack of enforcement motivation in Chinese communities). Beijing's influence over local officials is extremely limited. See *id.* at 823. While local officials report to superiors within the same overarching central administration, it is local politicians who control the local "officials' appointments, dismissals, salaries, housing, and other benefits." *Id.*

97. See *id.* at 822-23 (describing why many local officials may opt to protect local interests).

98. See *Atomised*, *supra* note 86, at 37 ("[S]ince the days of Mao each new generation of leaders in Beijing has been increasingly less able to command instant obedience across the country.").

99. See Yonehara, *supra* note 8, at 82 (stating that decentralization has resulted in local administrations acquiring governing power independent of Beijing). "The traditional Chinese saying, 'The mountains are high, and the Emperor is far away,'" is applicable to the modern local administrations and their independence from Beijing. *Id.* For example, the local officials must enforce the Copyright Law at the local level. See *id.* at 96. "This grant of authority has developed to the point of creating numerous fiefdoms throughout China, in which a movie studio seeking redress for copyright infringement must negotiate a tortuous maze of individual governments, each with their own specific procedures and regulations in dealing with copyright enforcement." *Id.*

100. See *Atomised*, *supra* note 86, at 38 (describing lack of consequence for failure to follow Beijing's anti-piracy orders).

101. Lisa Movius, *Imitation Nation*, SALON, July 8, 2002, http://archive.salon.com/tech/feature/2002/07/08/imitation_nation/index.html (describing reluctance by local officials to crackdown on piracy).

III. ANALYSIS: COMBATING CHINESE PIRACY

Given the high film piracy rate in China, the U.S. film industry may have to look for assistance from the WTO¹⁰² or pursue individual lawsuits in Chinese courts against the film piracy industry if it hopes to minimize market losses.¹⁰³ While these options might provide some short-term relief, they ultimately may prove ineffective or even backfire.¹⁰⁴ Alternatively, the U.S. film industry can petition China to improve its IP enforcement mechanisms.¹⁰⁵ For an effective approach, the U.S. film industry can highlight piracy's grievous harm to China's own film industry.¹⁰⁶

A. WTO Referral

Dan Glickman, CEO of the MPAA, has argued that the "best leverage" for getting China to combat film piracy is the WTO.¹⁰⁷ A U.S. case before the WTO would likely allege inadequate Chinese enforcement before the WTO's Dispute Settlement Body ("DSB").¹⁰⁸ "[T]he WTO dispute resolution identifies treaty non-

102. See Yu, *Still Dissatisfied*, *supra* note 8, at 144 (noting debate over whether to file WTO complaint).

103. See Heiberg, *supra* note 6, at 247 ("American film companies . . . must also continue to file lawsuits in Chinese courts and work together directly with Chinese authorities to prosecute copyright violations.").

104. For a further discussion of the futility of pursuing a WTO case against China or filing individual lawsuits against film pirates, see *infra* notes 107-69 and accompanying text.

105. See Heiberg, *supra* note 6, at 244 ("[E]ffective change will only come from a change in Chinese political will.").

106. See IMPACT OF MOVIE PIRACY ON CHINA, *supra* note 15, at 26-28 (explaining piracy's harmful effects on China's film industry).

107. Pete Engardio & Catherine Yang, *The Runaway Trade Giant*, BUS. WK., Apr. 24, 2006, at 30, 32 (commenting on U.S. efforts to combat Chinese piracy). "Because of China's WTO membership, the United States can no longer impose unilateral sanctions on the country concerning the lack of intellectual property protection, as it threatened to do a decade ago. Instead, the United States has to resolve the dispute through the mandatory WTO dispute settlement process." Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 904 (2006) [hereinafter Yu, *Pirates*].

108. See Jeffrey Michael Smith, *Three Models of Judicial Institutions in International Organizations: The European Union, the United Nations, and the World Trade Organization*, 10 TULSA J. COMP. & INT'L L. 115, 143-44 (2002-2003) [hereinafter Smith, *Three Models*] (explaining Dispute Settlement Body's ("DSB") role in WTO). While the DSB technically controls the WTO's dispute resolution functions, it actually "plays a very limited role in the dispute resolution process." *Id.* at 143. The intricate WTO dispute resolution begins with a consultation phase where the complaining WTO member requests the alleged violating WTO member to negotiate a settlement. See *id.* at 144. If the consultations fail, the complaining WTO member may then request for a dispute resolution panel. See *id.* At the first litigation stage, a panel is established by the Secretariat. See *id.* Candidates for the panel are drawn from government officials or private citizens. See *id.* The panel, once approved by

compliance, measures the cost of the noncompliance to the complaining member, and authorizes the complaining member to take proportionate action against the violator.”¹⁰⁹ But according to Nicholas R. Lardy, a China trade expert at Washington’s Institute for International Economics, the WTO’s lack of transparent enforcement standards may limit a U.S. case against China.¹¹⁰ Moreover, should the U.S. case fail, an emboldened China could then “ease the pressure on pirates.”¹¹¹

Professor Peter K. Yu¹¹² has suggested at least four reasons for why the U.S. should not file a formal WTO complaint against China

the parties, serves as the trier of fact and will hand down its decisions (based on party submissions and other essential information) in the form of a panel report. *See id.* This panel report is then adopted by the DSB. *See id.* If the losing party disagrees, it can appeal to the WTO’s standing Appellate Body. *See id.* at 145. The Appellate Body is comprised of seven individuals appointed by the DSB who are not affiliated with any government. *See id.* Only three of the members may serve on a single appeal. *See id.* The appellate panel limits its review of the panel report to “issues of law” and “legal interpretations.” *See id.* The WTO panels do not create new law; they simply interpret the law as it is in order to ensure “security and predictability” for WTO members. *See id.*

109. *Id.* at 151 (conceding DSB’s inability to enforce judgments); *see also* Heiberg, *supra* note 6, at 245 (“The DSB exists more to resolve disputes than to make rulings, and therefore many cases are negotiated between countries for several years without resolution.”). “[T]he WTO panels cannot directly strike down or enact law in a member country. Nor can they order a member country to pay money or to act in any other way.” Smith, *Three Models*, *supra* note 107, at 151 (indicating limitations of WTO dispute resolution protocol).

110. *See* Engardio & Yang, *supra* note 107, at 32 (noting weakness of WTO’s enforcement procedure); *see also* Heiberg, *supra* note 6, at 244-45 (“While the DSB is an attractive venue for settling some international trade disputes, the potential time and burden of proof required to settle disputes through the DSB makes it an uninviting arena in which to solve U.S.-Chinese IP disputes.”).

111. Engardio & Yang, *supra* note 107, at 32 (describing potential backlash of failed WTO case).

112. *See* MSU Law: Faculty Profile, http://www.law.msu.edu/faculty_staff/profile.php?prof=323 (last visited Mar. 8, 2007) (setting forth faculty profile of Peter K. Yu). Professor Yu is a leading expert in international intellectual property law:

Professor Yu is . . . a research fellow of the Center for Studies of Intellectual Property Rights of Zhongnan University of Economics and Law in Wuhan, China, and a former research associate of the Programme in Comparative Media Law & Policy at the Centre for Socio-Legal Studies, University of Oxford

Prior to joining Michigan State University, he was an acting assistant professor of law, the executive director of the nationally-ranked Intellectual Property Law Program, and the deputy director of the Howard M. Squadron Program in Law, Media & Society at Benjamin N. Cardozo School of Law, Yeshiva University, where he taught immediately after law school graduation.

Id.

with the DSB.¹¹³ Like Lardy, Professor Yu first noted that, while the WTO requires each member state to provide effective IP enforcement, it does not properly define those terms.¹¹⁴ Further, even if the DSB panel created an empirical standard for “effective enforcement,” the U.S. may ultimately lack sufficient evidence.¹¹⁵ Many small and midsized U.S. companies are generally uncooperative in providing piracy data to the United States Trade Representative (“USTR”).¹¹⁶ These companies fear that disclosing information will adversely affect their hard-earned *guanxi* (personal connections) in China and may lead to political and business reprisals.¹¹⁷ Rather than get involved, these firms prefer to remain on the sidelines.¹¹⁸ This way, should the U.S. case fail, they will “have demonstrated loyalty to their Chinese connections throughout the process.”¹¹⁹

113. See Yu, *Still Dissatisfied*, *supra* note 8, at 144 (asserting futility of DSB route). For a detailed discussion of the problems of a U.S. WTO case against China, see Yu, *Pirates*, *supra* note 104, at 927-46 (arguing five reasons why U.S. should not pursue WTO case against China). The U.S. has already joined the European Union and Canada in asking the WTO to “rule in a dispute with China over import tariffs on auto parts” *US, Canada Join EU in Hauling China to WTO Over Auto Dispute*, AGENCE FR.-PRESSE, Sept. 15, 2006, <http://asia.news.yahoo.com/060915/afp/060915152236eco.html> (reporting WTO case against China). U.S. Trade Representative (“USTR”) Susan Schwab has charged China with imposing restrictions that “unfairly discriminate” against U.S. auto parts and discourage automobile manufactures from using imported auto parts in vehicle assembly. See *id.* (highlighting accusations). “We believe that these actions are inconsistent with China’s WTO obligations and are acting accordingly.” *Id.* (quoting USTR Schwab). The U.S. has since threatened further WTO action against China. See *US Threatens New WTO Action Against China*, AGENCE FR.-PRESSE, Oct. 13, 2006, <http://www.forbes.com/home/feeds/afx/2006/10/13/afx3090739.html> (focusing on U.S. consideration of future WTO cases against China over copyright issues and foreign investment). In comments to major US investors in China, USTR Schwab highlighted both IP rights abuses and Chinese subsidies for domestic industries. See *id.* While noting that utilizing the WTO is not a “hostile act,” USTR Schwab did indicate that China is on a “dangerous” track and could spark new WTO disputes. See *id.*

114. See Yu, *Still Dissatisfied*, *supra* note 8, at 145 (noting lack of transparency).

115. See *id.* (describing potential obstacle to WTO case against China).

116. See *id.* (explaining reason for insufficient evidence).

117. See *id.* (citing reason for reluctance to disclose information); see also Engardio & Yang, *supra* note 107, at 32 (discussing problem where “many U.S. software companies have been unwilling to gather and supply the hard data needed to mount a successful case”). Many U.S. companies do not want to be seen as cooperating with the U.S. government in a WTO case against China because they fear retaliation and also because they doubt a successful WTO ruling will “solve anything, given China’s weak rule of law.” *Id.*

118. See Yu, *Still Dissatisfied*, *supra* note 8, at 145 (stating position of many U.S. companies). They “find it wise to free ride on the enforcement efforts of their competitors and partners.” *Id.*

119. *Id.* (emphasizing importance of cordial relationship with Chinese officials and companies).

Second, even if the U.S. could collect the necessary data, most previous WTO cases involve deficiencies in a WTO member's laws, rather than deficiencies in their enforcement.¹²⁰ A U.S. challenge against China based on nonimplementation grounds would probably prove unsuccessful, for most of China's copyright laws are now in conformity with TRIPS.¹²¹ If the U.S. chose instead to challenge on nonenforcement grounds, TRIPS might even side with China.¹²² Professor Yu argues that, "[u]nder article 41(5) of the TRIPS Agreement, a WTO member state is not required to devote more resources to intellectual property enforcement than to other areas of law enforcement."¹²³ Thus, if China can show its piracy problem is not worse than another enforcement area, such as tax collection, China would likely prevail.¹²⁴ Given that TRIPS does not require countries to prioritize IP protection ahead of other enforcement areas, China merely needs to show that its IP enforcement is on par with other enforcement areas.¹²⁵

Third, the U.S. is not invincible in the WTO dispute settlement process.¹²⁶ For example, Antigua and Barbuda recently challenged and prevailed against U.S. gambling laws.¹²⁷ If tiny Caribbean islands are successful in claims against the U.S., one can "only imag-

120. *See id.* (pointing out "structural challenges" related to WTO IP DSB case). The closest WTO precedents involving enforcement were the U.S. cases against Greece and the European Communities, where the U.S. accused Greece of not effectively enforcing IP rights and thereby violating articles 41 and 61 of TRIPS. *See id.* at 145-46. "The cases were eventually settled." *Id.* at 146.

121. *See id.* at 146 (hypothesizing Chinese response). "In the wake of WTO accession, China revamped its copyright, patent, and trademark laws while introducing new implementing regulations, administrative measures, and judicial interpretations." *Id.*

122. *See id.* (arguing futility of challenging China on nonenforcement grounds). Article 41(5) is a potential barrier to a WTO case against China based on nonenforcement grounds. *See id.* Article 41(5) reads:

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

TRIPS Document, *supra* note 24, at 338.

123. Yu, *Still Dissatisfied*, *supra* note 8, at 146 (describing limitations of Article 41(5)).

124. *See id.* (theorizing WTO case outcome).

125. *See id.* (explaining hypothetical WTO case outcome).

126. *See id.* at 147 ("Third, the WTO dispute settlement process does not guarantee victory for the United States.").

127. *See id.* (noting successes of Caribbean islands in WTO cases against U.S.).

ine what it would be like when an emerging trading power like China decides to face off with the United States.”¹²⁸

Finally, a formal WTO complaint will likely strain China’s relationship with the U.S.¹²⁹ In particular, a poorly argued WTO case against China could ultimately backfire on the entire international community.¹³⁰ China is still a fledgling WTO member and requires proper guidance to become a respectable member of the international trading body.¹³¹ Provoking China with WTO complaints early in this process will delay its development.¹³²

B. Lawsuits Against Chinese Retailers

The MPA, on behalf of several U.S. movie studios, filed civil lawsuits in China on September 13, 2006 alleging copyright infringement against two Beijing retail stores that sold pirated versions of *The 40-Year-Old Virgin*, *The Incredibles*, *Mr. and Mrs. Smith*, *War of the Worlds*, and other Hollywood films.¹³³ The MPA studios demanded damages (\$7,500 per title), an order for the Beijing shops to cease sales of pirated films, and an apology.¹³⁴ Roughly three months later, the Beijing No. 2 Intermediate People’s Court ruled in favor of the MPA studios against one of the stores, ordering Yu Hao Qing DVD store to stop selling pirated films and pay a fine of \$20,100.¹³⁵

128. Yu, *Still Dissatisfied*, *supra* note 8, at 147.

129. See Yu, *Pirates*, *supra* note 106, at 944 (warning against filing WTO complaint against China).

130. See Yu, *Still Dissatisfied*, *supra* note 8, at 148 (noting potential effects of WTO case against China).

131. See *id.* (discussing how China is currently undergoing transition to full compliance with WTO rules).

132. See *id.* (“It is, therefore, important that the U.S. administration be patient and provide guidance as China learns to become a respectable member of the international trading body.”).

133. See Ang, *supra* note 63 (describing MPA studios’ lawsuit against Chinese retailers). The lawsuits were filed in the Beijing No. 1 and No. 2 Intermediate People’s Courts:

The suits were filed on behalf of Sony Corp.’s Columbia Pictures Industries Inc.; The Walt Disney Co.’s Disney Enterprises Inc.; Viacom Inc.’s Paramount Pictures Corp.; News Corp.’s Twentieth Century Fox Film Corp.; Time Warner Inc.’s Warner Bros. Entertainment Inc. and Universal City Studios LLLP, which is part of NBC Universal, which in turn is 80 percent owned by General Electric Co. and 20 percent by Vivendi SA, the French media and telecommunications conglomerate.

Id.

134. See *id.* (describing civil claims made by MPAA studios).

135. See Scott McDonald, *5 U.S. Film Studios Win Piracy Case*, ASSOCIATED PRESS, Dec. 19, 2006, available at <http://www.mercurynews.com/mld/realcities/entertainment/movies/16275003.htm> [hereinafter McDonald, *Piracy Case*] (reporting outcome of MPA lawsuit against Chinese DVD store). The guilty verdict

The MPA studios may have accomplished two things through the judicial ruling: (1) punish the actual violators while recovering some monetary damages, and (2) increase Chinese awareness of copyrights.¹³⁶ But the overall impact of the judgment was probably inconsequential to the thriving film piracy industry.¹³⁷

1. *Distinguishing Between Distributors and Suppliers*

The MPA studios recently secured a judgment against a distributing retailer in Beijing, the prominent and urban capital of China, but the primary suppliers of film piracy are located in “rural communities, towns, and cities of all sizes across China”¹³⁸ These rural-based suppliers are the driving force behind all sorts of IP piracy in China including film piracy.¹³⁹ Merely targeting the urban retailers will not eliminate the actual sources of film piracy, which generally operate out in the countryside.¹⁴⁰ Moreover, selecting a few major retailers will do little to curb piracy film distribution.¹⁴¹ There are many DVD and VCD shops in China and even more street vendors.¹⁴² In fact, good quality pirated DVDs of the

against Yu Hao Qing DVD store and Beijing Century Hai Hong Trading Co. Ltd, its parent company, was issued on December 19, 2006. *See id.* The MPA suit had originally sought \$247,000 in damages. *See Superman Battles, supra* note 82 (describing MPA suit against DVD retailers).

136. *See* Heiberg, *supra* note 6, at 247 (urging U.S. film studios to file lawsuits in Chinese courts).

137. *See* McDonald, *Piracy Case, supra* note 135 (stressing fact that Beijing is still “awash” in pirated films despite recent MPA court victory).

138. Priest, *supra* note 8, at 822 (highlighting role of rural communities, towns, and cities in Chinese piracy trade); McDonald, *Piracy Case, supra* note 135 (discussing MPA court victory).

139. *See* Priest, *supra* note 8, at 822 (questioning commitment of local authorities to enforcing copyright laws).

140. *See* Chow, *Commercial Piracy, supra* note 81, at 220 (indicating hundreds of small Chinese towns that are involved in counterfeiting).

141. *See* Guilford, *supra* note 80 (citing wide availability of counterfeit DVDs as one reason for film piracy’s success in China).

142. *See* Henry Blodget, *How to Solve China’s Piracy Problem*, SLATE, Apr. 12, 2005, <http://www.slate.com/id/2116629> (commenting on China’s DVD piracy industry). China’s piracy industry is so ingrained that even the pirates are complaining. *See id.* “Chinese storekeepers who sell fake DVDs for 10 yuan gripe about street vendors selling them for seven. And the street vendors complain about competitors offering two-for-one specials.” *Id.* In Shanghai, it appears that “[o]n every pedestrian overpass, subway stairwell or crowded street, there is at least one man, invariably middle-aged with greasy hair, opening a briefcase to reveal a selection of imitation name-brand perfumes.” Movius, *supra* note 101 (describing ubiquitous piracy situation in Shanghai). “Next to him, resting on a folding chair, is the inevitable cardboard box crammed with pirated discs.” *Id.*

blockbuster film *Borat* were available for sale in Beijing during the same week of the judicial ruling against Yu Hao Qing DVD store.¹⁴³

2. *Problems with Targeting Piracy Suppliers*

Alternatively, the MPA studios could sue the film pirates themselves.¹⁴⁴ While this would actually affect the piracy source, the cheap and simple method of burning DVDs “allows pirates to set up new factories almost overnight, immediately after one is shut down.”¹⁴⁵ Complicating matters, pirates have become extremely deft at avoiding detection.¹⁴⁶ Unlike the more visible and accessible Beijing video retailers, film pirates continue to find innovative ways to avoid authorities.¹⁴⁷ First, film piracy operations can function underground in tiny rooms with as few as two or three people.¹⁴⁸ The production sites are usually concealed or disguised as “chicken farms” or other covers.¹⁴⁹ Some of these sites install air pumps to discharge production fumes that could potentially blow their covers.¹⁵⁰ In addition, pirates set up production sites in remote and inaccessible places like abandoned gas stations and former military facilities.¹⁵¹

Distribution channels are also concealed from authorities.¹⁵² Often packages containing pirated discs are disguised as eggs, seafood, stationary, and other covers, and they change hands several times before reaching their retail destination.¹⁵³ “With a single person to contact and different people and vehicles involved in the

143. See McDonald, *Piracy Case*, *supra* note 135 (reporting availability of pirated DVDs in Beijing during week of December 18, 2006).

144. For a further discussion on U.S. film studios filing lawsuits against suppliers of film piracy, see *infra* notes 155-69 and accompanying text.

145. Heiberg, *supra* note 6, at 242 (describing ease of DVD piracy operations). The light weight and small size of DVDs allow for easy transportation throughout the country. See *id.*

146. See IMPACT OF MOVIE PIRACY ON CHINA, *supra* note 15, at 33 (noting camouflage tactics used to evade anti-piracy efforts).

147. See *id.* (“To counter anti-piracy efforts, pirated product makers continually innovate.”).

148. See *id.* (describing working conditions). The workers stay in the underground factory for months as their meals literally are sent in from the outside. See *id.*

149. See *id.* (noting camouflage technique employed by pirates).

150. See *id.* (noting plants “discharge production fumes in farm fields through hidden pipelines up to several hundred meters long”).

151. See IMPACT OF MOVIE PIRACY ON CHINA, *supra* note 15, at 33 (“Caves, abandoned gas stations and outdated military facilities all can be used as hiding places.”).

152. See *id.* at 34 (discussing additional evasive methods of pirates).

153. See *id.* (describing techniques for disguising pirated films during transportation). Retail destinations of pirated films usually involve two types: regular

transportation process at different stages, the drivers normally have no idea what they are transporting.”¹⁵⁴

3. *Judicial Incompetence in Rural Areas*

Even if the MPAA studios could successfully locate and proceed with legal action against film pirates, the studios’ efforts would likely be stifled by the ill-prepared rural judiciary system.¹⁵⁵ Many piracy production sites are located in rural locales, meaning a case would be tried initially in the “local county-level court of the infringer’s domicile.”¹⁵⁶ While many lawyers and judges in the major Chinese cities have improved their understanding of IP matters, poor legal training is still pervasive in the rural areas.¹⁵⁷ Local judges simply cannot handle complicated film piracy cases.¹⁵⁸

If the MPAA studios do, however, manage to obtain a verdict in a local civil court, the verdict may be unenforceable.¹⁵⁹ Enforcing a judgment is difficult because the judgments are rarely conclusive.¹⁶⁰ There are many ways to relitigate a case and, “[f]or up to two years after a judgment, any party can petition for retrial” on the basis of virtually “any reason that would also be grounds for an appeal.”¹⁶¹

Perhaps of greater concern to the MPAA studios seeking judicial enforcement and compensation is local protectionism.¹⁶² This

audio/video stores and itinerant peddlers. *See id.* The former sell both legitimate and pirated films while the latter sell pirated films throughout the country. *See id.*

154. *Id.* “Throughout the whole process, the ‘bosses’ hide behind the curtain, with their subordinates dealing with the drivers.” *Id.*

155. *See* Priest, *supra* note 8, at 827 (noting that poor legal training has traditionally been a problem in the Chinese countryside).

156. *Id.* (describing procedure for initial trial against film pirates).

157. *See id.* at 826-27 (distinguishing between rural and urban legal communities in China).

158. *See id.* at 827 (noting that local judges lack experience and understanding of IP law to hear piracy cases).

159. *See* Lindsay Wilson, *Investors Beware: The WTO Will Not Cure All Ills with China*, 2003 COLUM. BUS. L. REV. 1007, 1020-21 (2003) (explaining difficulty of enforcing judgments in Chinese legal system). A verdict might include an “award, damages, or injunction.” *Id.* at 1021. “There are no hard statistics regarding how many judgments go unenforced, but clearly this is a major shortfall in the Chinese rule of law.” *Id.*

160. *See id.* (indicating reason for enforcement problems).

161. *Id.* (discussing obstacles to enforcing judicial proceedings). Reasons for which a party may petition for a retrial include “new evidence, insufficient evidence, corruption, procedural irregularity, [and] misapplication of law” *Id.*

162. *See* Wang, *supra* note 35, at 297-98 (“[C]ourt judgments are generally hard to enforce due to protectionist discretion in local enforcement.”). Further, judicial judgments are not bound by *stare decisis* so there is no uniformity in the application of law. *See id.* at 298.

problem starts with the judges.¹⁶³ Because judges at all levels are appointed by the particular administration at the corresponding level, local judges are appointed by the LPC.¹⁶⁴ The local administration therefore controls the judge's "salary, housing, freedom of movement about the country, reproductive rights, professional perquisites and continued employment"¹⁶⁵ These judges, like the previously mentioned local officials, are heavily influenced by the local administration.¹⁶⁶

Besides compromising the judiciary, local governments also can enlist the help of the local police and procuracy to dodge judgments.¹⁶⁷ Finally, as previously discussed, local officials, including judges and other enforcement officials, are strongly influenced by local interests.¹⁶⁸ "Faced with the choice of disobeying a directive from a higher level unit that is powerless to sanction disobedience and a directive from the local mayor who can terminate employment or arrange an undesirable job transfer or salary cut, many local enforcement officials opt to protect local interests."¹⁶⁹

C. Highlighting the Adverse Effects of Film Piracy on China's Film Industry and Economy

Rather than rely on the WTO or litigation, the U.S. film industry can try convincing Beijing that confronting film piracy would be in its best interests. Here, the MPAA studios can point out that film piracy is detrimental both to the emerging Chinese film industry and to China's overall economy.¹⁷⁰ While the immediate effects may be minimal at best, Hollywood stands to gain far more once Beijing becomes equally committed to combating film piracy.¹⁷¹ Further, this approach is less likely to provoke the Chinese.¹⁷²

163. See Wilson, *supra* note 159, at 1015 (discussing judicial appointments).

164. See *id.* (explaining judicial appointment structure).

165. *Id.* (expressing LPC's influence over judiciary).

166. See *id.* (asserting strong local influence over judiciary).

167. See *id.* at 1022 (noting tactic by local governments to avoid judicial enforcement).

168. See Priest, *supra* note 8, at 823 (describing local control over officials).

169. Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L.Q. 1, 29-30 (2000).

170. See IMPACT OF MOVIE PIRACY ON CHINA, *supra* note 15, at 2 (arguing that pirated foreign films in China's market greatly exceeds legitimate domestic films).

171. See Yonehara, *supra* note 8, at 80 (discussing how China will seriously protect IP rights after Beijing realizes that "it will be in their best economic interests to do so").

172. See Yu, *Pirates*, *supra* note 106, at 944 ("Because the [U.S. and China] had been adversaries in only two [WTO] cases, 'initiation of a complaint would be

1. *Film Piracy's Negative Impact on the Chinese Film Industry*

According to a 2006 report by LEK Consulting, Chinese film piracy cost the worldwide film industry \$2.7 billion in 2005.¹⁷³ Yet \$1.5 billion of the piracy cost was attributed to China's film industry.¹⁷⁴ By comparison, the U.S. film industry lost an estimated \$565 million.¹⁷⁵ "In terms of who's losing the most here in China, it's not the MPA['s] member companies. It's the local industry," concluded Mike Ellis, the head of the MPA's Asia Pacific division.¹⁷⁶

While the piracy of Chinese films is partly responsible for the staggering local industry losses, pirated Hollywood films ironically may play a greater role.¹⁷⁷ Because most foreign films in China are low-priced pirated optical discs, Chinese consumers probably would choose the cheaper Hollywood films over paying substantially more to watch a Chinese film in a theater.¹⁷⁸ Not surprisingly, according to the *Study of the Impact of Movie Piracy on China's Economy* ("2006 Study"), a joint 2006 report on the impact of film piracy on China's economy, fifty percent of Chinese film industry respondents believe "the larger the market for pirated movies, the worse their own operating results."¹⁷⁹ The Chinese companies that reported the most

something of a slap in the face.'" (quoting William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L. L.J. 51, 71 (1987))).

173. See *China Piracy Costs*, *supra* note 10 (stating piracy cost to film makers); LEK, *supra* note 10, at 10 (charting motion picture consumer spending loss by country). The \$2.7 billion China figure includes losses reflected by "producers, distributors, theaters, video stores and pay-per-view providers" in the U.S. and around the world. *Id.* According to the LEK report, \$1.63 billion of the \$2.7 billion piracy cost was attributed to pirated video discs while \$1.04 billion was attributed to the internet. See *China Piracy Costs*, *supra* note 10 (distinguishing between hard copy and internet piracy).

174. See *China Piracy Costs*, *supra* note 10 (highlighting Chinese film industry's consumer spending loss).

175. See *id.* (highlighting U.S. film industry's consumer spending loss).

176. *Id.* (emphasizing film piracy's significant harm towards China's film industry).

177. See Heiberg, *supra* note 6, at 256 (discussing accessibility of cheap pirated DVDs).

178. Cf. at *id.* ("Rather than paying an exorbitant amount of money to buy one ticket . . . in a theater, instead the cheap prices of pirated DVDs allow Chinese citizens to buy, own, watch . . . foreign movies."). Despite price cuts at Shanghai theaters, an average movie ticket still costs about fifty to sixty *yuan*, which is far more expensive than the widely available five to eight *yuan* pirated DVDs. See Kathy Fong, *Cinemas Dying Out Due to Piracy*, THE STAR ONLINE, Dec. 24, 2006, <http://thestar.com.my/news/story.asp?file=/2006/12/24/asia/16350881&sec=asia> (explaining Chinese preference for pirated DVDs over cinemas).

179. IMPACT OF MOVIE PIRACY ON CHINA, *supra* note 15, at 26 (mentioning survey results conducted by Center For American Economic Studies under the Institute of World Economics & Politics and Chinese Academy of Social Sciences). The other fifty percent of Chinese industry respondents actually maintained that the size of the pirated film market had no effect on their operating results. See *id.*

damage are private film companies that employ the majority of elite Chinese directors and famous actors and actresses.¹⁸⁰

Further, the 2006 Study found that seventy-five percent of industry respondents believe piracy has reduced both their box office revenues and royalties.¹⁸¹ About two-thirds of industry respondents also believe that piracy has hampered the overall development of China's film industry.¹⁸² By contrast, just five percent thought that piracy has no impact on China's movie industry.¹⁸³

2. *Film Piracy's Negative Impact on China's Economy*

As part of an illegal industry, film pirates pay no taxes.¹⁸⁴ This tax evasion is directly felt by the state treasury.¹⁸⁵ More importantly, though, film piracy also harms the economy by "squeezing" related legitimate industries such as the aforementioned private film companies.¹⁸⁶ In fact, over sixty-two percent of industry respondents believe film piracy "has significantly reduced the government's tax revenues"¹⁸⁷

Yet over eighteen percent of industry respondents interviewed claimed film piracy has increased local government tax revenues.¹⁸⁸ They argue that film piracy is responsible for sustaining the economies of local cities and creating local jobs.¹⁸⁹ These employment opportunities generally are filled by a "large number of people at the bottom of . . . society" such as farmers and unemployed work-

These companies, however, tend to be state-owned film enterprises and do not rely on profitability and competitiveness like private Chinese film companies. *See id.* In fact, most state-owned film companies no longer produce films, relying instead on rent from "plant and equipment, as well as administration fees levied on actors." *Id.* In China, actors and actresses under contract to state-owned film companies must pay a fee whenever they work for a private film company. *See id.* n.14. Because most state-owned film companies no longer produce films, they encourage their actors and actresses to work for the private film companies. *See id.*

180. *See id.* at 26 (highlighting piracy's effect on Chinese films featuring famous directors and actors).

181. *See id.* at 27 (summarizing effects of piracy on Chinese film profits).

182. *See id.* at 28 (reporting sixty-five percent of Chinese movie companies believe piracy has hurt China's film industry).

183. *See id.* (noting small percentage of Chinese movie companies believe piracy has negligible impact on domestic film industry).

184. *See IMPACT OF MOVIE PIRACY ON CHINA*, *supra* note 15, at 30 (asserting film piracy's tax evasion).

185. *See id.* (describing effect of film piracy's tax evasion on state treasury).

186. *See id.* (noting consequences of film piracy's effect on legitimate industries).

187. *Id.*

188. *See id.* (stating minority view held by Chinese film companies surveyed).

189. *See IMPACT OF MOVIE PIRACY ON CHINA*, *supra* note 15, at 30 (noting film piracy's role in local economy from perspective of some enterprises).

ers.¹⁹⁰ In fact, some Chinese towns rely entirely on the production of pirated goods including films.¹⁹¹

Still, while film piracy may have caused an increase in illegal employment, there has not been a corresponding rise in the employment level of China's legitimate film industry.¹⁹² Of the industry respondents interviewed in the 2006 Study, ninety-two percent believe that piracy has made a small or negligent impact on the film industry's overall employment level.¹⁹³ Some of these companies reasoned that film piracy makes up for eliminating some legitimate jobs by creating illegal jobs.¹⁹⁴

While the 2006 Study did acknowledge some film piracy benefits, the overall impact of film piracy on China's economy seems to fall into two categories: short-term benefits and long-term losses.¹⁹⁵ In the short-term, film piracy benefits Chinese consumers by providing cheaper DVDs and contributing to lowered price levels of legitimate products.¹⁹⁶ Because many pirated movies are foreign, their low-cost accessibility can help "broaden the cultural horizons of consumers in China."¹⁹⁷ Finally, film piracy stimulated China's VCD and DVD players industry.¹⁹⁸

But the 2006 Study also concluded that film piracy will lead to long-term harm.¹⁹⁹ Many Chinese movie producers stated that film piracy greatly lowers their profits.²⁰⁰ "To movie producers, piracy has undermined the capability of China's movie industry to obtain market returns and fundamentally hindered the development of the whole movie industry"²⁰¹ For example, the 2004 Chinese film *Baober in Love* made six million *yuan* in its debut but less than two million *yuan* the day after, when pirated DVDs became availa-

190. *Id.* at 29 (describing film piracy's positive influence on poor workers).

191. *See* Lara, *supra* note 5, at 353 n.71 (discussing why crackdown on film piracy industry would eliminate jobs).

192. IMPACT OF MOVIE PIRACY ON CHINA, *supra* note 15, at 29 (reporting majority view on overall employment levels).

193. *See id.* (stating consensus of Chinese film makers surveyed).

194. *See id.* ("[P]ointing out that piracy squeezes some legal jobs while increasing some illegal ones.").

195. *See id.* at 31-32 (summarizing 2006 Study).

196. *See id.* (noting this is what consumers want).

197. IMPACT OF MOVIE PIRACY ON CHINA, *supra* note 15, at 32 (discussing film piracy's impact on cross-cultural understanding).

198. *See id.* ("Pirated movies greatly boosted the growth of VCD and DVD players industry.").

199. *See id.* (outlining significant long-term losses to China's economy and film industry).

200. *See id.* at 28 (indicating concerns of Chinese movie producers).

201. *Id.* at 32.

ble.²⁰² Piracy has also caused China to suffer decreases in tax revenues and increases in anti-piracy enforcement costs.²⁰³ More troubling, perhaps, is the ensuing damage to the country's international reputation.²⁰⁴ China has already been labeled as the "piracy capital of the world."²⁰⁵ Such a label will hurt the country's image,

202. See IMPACT OF MOVIE PIRACY ON CHINA, *supra* note 15, at 35 (citing example of Chinese film affected by film piracy). In China, "sidewalk vendors sell unlicensed DVDs of Chinese movies for as little as 50 cents." Joe McDonald, *Piracy Hurting China's Own Industries*, July 1, 2006, ASSOCIATED PRESS, <http://abcnews.go.com/Business/wireStory?id=2144321&page=1> [hereinafter McDonald, *Piracy Hurting*] (noting accessibility of pirated Chinese films in China). While in China, the author of this Comment encountered pirated versions of the Chinese blockbuster films *Hero* and *House of Flying Daggers*, and classic Chinese films such as *Farewell My Concubine* and *Raise the Red Lantern*.

203. See IMPACT OF MOVIE PIRACY ON CHINA, *supra* note 15, at 32 (noting film piracy's effects on government's budget).

204. See *id.* (arguing film piracy's negative impact on China's international reputation). The U.S. is contemplating a possible WTO case "against China for failing to stop widespread piracy and counterfeiting of American goods." USTR Aide Warns of More WTO Cases Against China, REUTERS NEWS SERVICE, Jan. 17, 2007, http://ca.news.yahoo.com/s/reuters/070117/us/politics_usa_china_trade_dc_3 (discussing U.S. frustration with China and its piracy reputation). But see Stanley Rosen, *Hollywood and China: Lost in Translation*, L.A. TIMES, June 18, 2006, available at <http://www.latimes.com/news/opinion/commentary/la-op-rosen18jun18%2C0%2C7142667.story?coll=la-news-comment-opinions> (explaining why Hollywood continues to expand in China despite film piracy and weak 2004 box office returns there). Reasons for why Hollywood remains committed to China's market include:

First, with the rapid expansion of the economy and the rise of a middle class with disposable income, the vast potential of the Chinese market continues to beckon.

Second, Hollywood studios view China as an increasingly participatory stakeholder in the international system, one that, given time, will begin to follow the rules.

Third, with the construction of many new state-of-the-art theaters in China, there is the expectation that blackout periods will become less justifiable; eventually there will be sufficient venues for both domestic and Hollywood films.

Fourth, a number of studios have begun to pursue co-productions with Chinese partners as a means of gaining greater market access and avoiding the restrictions that afflict standard Hollywood releases.

Finally, most of the major American players in China's film business do not view the Chinese market primarily in terms of the exhibition of theatrical films. Their interests are far broader, including theme parks, infrastructural development and the provision of technological expertise.

Id.

205. See, e.g., Movius, *supra* note 101 ("Mainland China is the piracy capital of the world."); Wang, *supra* note 35, at 291 ("On the other hand, China's reputation for being an intellectual property black hole is not undeserved."); IIPA, 2001 REPORT, *supra* note 43, at 25 ("It is the absence of effective and deterrent enforcement that will drive the local copyright industries into the ground and continue to cause the international community to refer to China ignominiously . . . as the 'piracy capital of the world.'"); Edward Iwata, *A Quick Trip to China: Come into the Back Room . . .*, USA TODAY, Oct. 25, 2006, available at http://www.usatoday.com/money/world/2006-10-05-china-trip_x.htm?csp=N009 ("Despite years of promised crackdowns by Chinese authorities, China is the world's leading producer of pi-

especially at a time when Beijing wants “China to transform itself from the world’s low-cost factory into an ‘innovation society’ that makes its own profitable technology and brand names.”²⁰⁶

3. *Beijing’s Actual Ability to Curb Film Piracy*

Even if Beijing were persuaded by the 2006 Study, the question remains as to how effectively it can combat film piracy. As previously mentioned, the local administrations often operate independent of Beijing’s wishes.²⁰⁷ Yet many commentators believe that a determined and committed Beijing can make a difference in the fight against film piracy.²⁰⁸ As one commentator theorized, had the pirates turned out documentaries of the violent 1989 Tiananmen Square crackdown instead of pirated copies of *The Lion King*, “the factory managers would be sharing a cell with other dissidents in a heartbeat.”²⁰⁹

rated goods” (quoting Raymond Burghardt, former U.S. Consul General in Shanghai and an Asia expert at Honolulu’s East West Center think tank)). “China produces around 70 percent of the world’s counterfeit goods, according to experts, with pirated music and video discs as well as all manner of fake brand-named products widely available.” *Superman Battles*, *supra* note 82 (describing China’s role in international piracy industry). “A considerable amount of very high quality pirate Chinese OD production continues to be exported.” IIPA, 2007 REPORT, *supra* note 44, at 99. In 2006, pirated optical discs from China circulated in the following major world markets: “Germany, Italy, Australia, Norway, Belgium, Canada, Mexico, the United States, Russia, the United Kingdom, the Netherlands, Israel, Paraguay, Lithuania, Singapore, Taiwan, the Philippines, Indonesia, Vietnam, Hong Kong, Malaysia, Thailand, Chile, New Zealand and South Africa.” *Id.*

206. McDonald, *Piracy Hurting*, *supra* note 201 (discussing effects of rampant piracy on China’s industrial image); *see also* IMPACT OF MOVIE PIRACY ON CHINA, *supra* note 15, at 32 (“[P]iracy . . . hamper[s] the growth and creativity of China’s movie industry, reducing in number original works.”).

207. For a further discussion of decentralization’s role in enabling Chinese piracy, *see supra* notes 86-101 and accompanying text.

208. *See* Priest, *supra* note 8, at 819 (“Many believe that widespread piracy in China is the result of a lack of will on the central government’s part to confront and eliminate the problem.”).

209. *Id.* at 819-20 (noting Beijing’s ability to curb piracy if it chooses to) (quoting James Shinn, *The China Crunch; Three Crises Loom in the Next 30 Days*, WASH. POST, Feb. 18, 1996, at C1); *see also* TED C. FISHMAN, CHINA INC. 237 (Scribner 2005) (“If the sellers of DVDs suddenly found a brisk market for disks that promoted Tibetan independence, the virtues of the banned religious sect Falun Gong, or Taiwan’s admission to the United Nations, these DVDs would certainly disappear overnight, and all those anticounterfeiting laws on the books would find ready application.”). For a further discussion of Beijing’s view towards Falun Gong, *see infra* notes 229-35 and accompanying text. Beijing considers Tibet to be a firm part of China despite protests from Tibetan exiles in India. *See* Barry Sautman, *Comment: Is Tibet China’s Colony?: The Claim of Demographic Catastrophe*, 15 COLUM. J. ASIAN L. 81, 82 (2001-2002) (discussing Tibet’s right to self-determination and separation from China). Likewise, Beijing considers Taiwan a province of China despite the latter’s independent government and split with the mainland after the 1949 Chinese Civil War. *See* Bruce Jacobs, *Taiwan’s History* —

In a more recent case, a vendor selling counterfeit souvenirs bearing the insignia of Beijing's 2008 Summer Olympic Games was raided by city officials and severely fined.²¹⁰ These cases suggest that Beijing possesses the ability to combat piracy but only chooses to do so when it furthers their own interests.²¹¹ Some commentators, however, have argued that this view fails to take into account the complexity and enormity of the piracy problem.²¹² This view also unfairly marginalizes the efforts made by Chinese officials to curb piracy.²¹³ After all, if Beijing were truly turning a blind eye to film piracy, then why would film pirates disguise their production sites as "chicken farms?"²¹⁴

and Destiny — of Freedom from China, THE CHRISTIAN SCIENCE MONITOR, Dec. 13, 2006, available at <http://www.csmonitor.com/2006/1213/p09s02-coop.html> (describing One-China policy, which proclaims Taiwan as China's province).

210. See Priest, *supra* note 8, at 820 (describing Beijing's crackdown on piracy related to 2008 Olympics); see also Engardio & Yang, *supra* note 107, at 32 (explaining China's copyright laws are sufficient, as evidenced by crackdown on Beijing Olympic knockoffs); *Intellectual Property Theft in China and Russia: Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary House of Representatives*, 109th Cong. 3 (2005) (statement of Rep. Berman, Member, House Comm. on the Judiciary) [hereinafter Congressional Hearing Berman] (commenting on China's copyright enforcement ability). Representative Howard Berman pointed out that the Chinese government in 2001 "tore down 690 billboards that illegally associated products with the [Beijing 2008 Summer Olympics], and ripped fake Olympic emblems off 67,000 taxis." *Id.*

211. See Congressional Hearing Berman, *supra* note 210, at 3 (concluding that China can successfully enforce IP protection when it chooses to).

212. See Yu, *Still Dissatisfied*, *supra* note 8, at 155 ("[T]here are many causes of piracy and counterfeiting in China . . ."); see also Priest, *supra* note 8, at 820 ("[P]iracy networks operate internationally and many pirated goods are imported into China . . ."). But see Alexa Olesen, *Chinese Pirates Skirt Ban, Sell 'Geisha'*, ASSOCIATED PRESS, Feb. 2, 2006, http://www.boston.com/ae/movies/articles/2006/02/02/chinese_pirates_skirt_ban_sell_geisha/?rss_id=Boston.com+%2F+A%26E+%2F+Movies (reporting how vendors in China were able to sell pirated DVDs of *Memoirs of a Geisha*, which was officially banned in China). Beijing's ability to "control pop culture has withered as Internet use booms and pirates flood the market with copies of unauthorized movies, books and music." *Id.*

213. See Priest, *supra* note 8, at 820-21 (noting that many Chinese government officials genuinely want to eradicate piracy); see also Shi Jiangtao, *CHINA: Intellectual Property Complaints Office to be Established*, SOUTH CHINA MORNING POST, Apr. 14, 2006, available at <http://www.asiamedia.ucla.edu/article.asp?parentid=43047> (reporting establishment of new government center for handling IP abuses). "Apart from focusing on protecting Olympic symbols and products, Beijing would crack down on pirated products in retail markets, exhibitions and trade fairs." *Id.*

214. For a further discussion of piracy camouflage methods, see *supra* notes 146-54 and accompanying text. "Vendors selling pirated DVDs and fake brand-name products continued to play cat and mouse with inspectors in Beijing yesterday, a day after the central government vowed to get tough on intellectual property rights violations." Irene Wang, *CHINA: Fake Goods Stalls Alter Tactics Amid Crackdown*, SOUTH CHINA MORNING POST, Apr. 13, 2006, available at <http://www.asiamedia.ucla.edu/article.asp?parentid=42912> (discussing government efforts to improve piracy enforcement). A customer at a pirated goods store was seen brows-

While Beijing is not entirely to blame for film piracy's rampant success in China, it could probably do more to confront the high rate of piracy. Despite its entrance into the WTO and the country's decentralization, China remains "a one party authoritarian state that is able to act swiftly and ruthlessly to suppress . . . problems that imperil national interests."²¹⁵

In China, the NPC is both the "ultimate lawmaking power" and the "preeminent organ of state authority."²¹⁶ While the respective governmental institutions have their own reserved powers, both the final legislative authority and the power to appoint officials to top positions within the State Council (the executive branch) lie with the NPC and the Chinese Communist Party.²¹⁷ Given this framework, China's government is often portrayed as possessing a "unified legislature and administrative bureaucracy."²¹⁸

Other non-legislative institutions also play a role in China's government.²¹⁹ While all government departments must answer to the NPC, most legal developments are negotiated between the various government bodies and institutions.²²⁰ For example, neither the Supreme People's Court nor the Supreme People's Procuratorate are legislative bodies, but both play important roles

ing through photo albums of items with brand logos such as Louis Vuitton, Gucci, and Burberry. *See id.* "After the customer made a selection, a saleswoman made a phone call and a man appeared several minutes later carrying a black plastic bag, which he handed over before disappearing." *Id.* At least two guards monitored the market place in an attempt to prevent such sales. *See id.*

215. Chow, *Commercial Piracy*, *supra* note 81, at 222 (noting Beijing's ability to crackdown on dissidents and corruption). For example, in the 1990s, China faced a substantial smuggling problem that involved both the local administrations and the People's Liberation Army. *See id.* Yet Beijing was able to virtually eradicate the problem in a matter of years through "political reform and harsh criminal punishment." *Id.*

216. Robert Bejesky, *Falun Gong & Re-Education Through Labor: Traditional Rehabilitation for the "Misdirected" to Protect Societal Stability Within China's Evolving Criminal Justice System*, 17 COLUM. J. ASIAN L. 147, 163 (2003-2004) (describing China's governmental structure). "[T]he NPC Standing Committee carries out the work of the NPC when it is not in session." *Id.*

217. *See id.* at 164 (describing relationship between China's legislative and executive branch). "The CCP is . . . the only real political party in China . . ." *Id.* at 165. Chinese Communist Party ("CCP") members hold most of the top government positions. *See* Chinese Communist Party, <http://www.globalsecurity.org/military/world/china/ccp.htm> [hereinafter Chinese Communist Party] (last visited Mar. 8, 2007). "The CCP is variously estimated to have between 40 million and 60 million members (about 4-5 percent of the national population)." *Id.*

218. Bejesky, *supra* note 216, at 164 (asserting characterization of China's government).

219. *See id.* (acknowledging government roles of non-legislative institutions).

220. *See id.* (commenting on process behind new legal initiatives).

in the criminal justice system.²²¹ Both institutions, however, are still somewhat limited by the NPC which controls the appointment and removal process.²²² In this way, China's legislative branch influences and shapes the decisions reached by the judicial branch.²²³ Holistically, this means that there is no true separation of powers at the national level, as the will of the NPC dominates both the executive and the judicial branches.²²⁴

a. The Falun Gong Crackdown

An example illustrating the power of China's authoritarian government was Beijing's systematic elimination of Falun Gong, a religious group that previously spanned millions of followers across the country and was viewed by Beijing as a political threat.²²⁵ Falun Gong followers assert that 50,000 members were arrested, over 5,000 were imprisoned, and at least 100 were killed after Beijing began its formal crackdown.²²⁶ Beijing has since "broken" the Falun Gong movement.²²⁷

221. *See id.* (discussing impact of non-legislative institutions on criminal law).

222. *See id.* at 164-65 (noting legislative branch's supervisory role over judicial branch).

223. *See* Bejesky, *supra* note 216, at 165 ("Thus, the Supreme People's Court and the Supreme People's Procuratorate are, to some degree, responsible to the NPC, as well as informally beholden to the CCP."); *see also* Joseph Kahn, *Chinese Official Warns Against Independence of Courts*, N.Y. TIMES, Feb. 3, 2007, available at http://www.nytimes.com/2007/02/03/world/asia/03china.html?_r=1&n=Top%2fNews%2fWorld%2fCountries%20and%20Territories%2fChina&oref=slogin (reaffirming judiciary branch's accountability to CCP). On its face, China's government structure resembles that of the U.S. and Europe. *See id.* But "[i]n practice, prosecutors and judges answer to Political-Legal Committees run by the Communist Party. Verdicts in cases that involve delicate issues are decided by ranking party officials" *Id.* (citing Chinese legal experts).

224. *See* Major Functions and Rights of the NPC, http://english.gov.cn/2005-09/02/content_28450.htm (last visited Mar. 8, 2007) (describing NPC's political supremacy under China's Constitution). Technically, China's Constitution calls for an independent judiciary, but in reality Beijing and the CCP intervene at all levels. *See* Chinese Communist Party, *supra* note 217 (describing CCP's strong influence over China's judiciary).

225. *See* Chow, *Commercial Piracy*, *supra* note 81, at 222 (noting China's effective response against Falun Gong). Falun Gong was a widespread religious sect that combined Buddhism with martial arts training. *See id.*

226. *See* Sautman, *supra* note 209, at 90 (describing results of Beijing's response against Falun Gong movement). "Western sources estimate that as of late 2000 'tens of thousands' of Falun Gong followers had been arrested, more than 10,000 were in custody and 77 had died." *Id.*

227. *See* Matthew Forney, *The Breaking Point*, TIME ASIA WEB EXCLUSIVE, June 25, 2001, <http://www.time.com/time/asia/news/magazine/0,9754,165163,00.html> (stating China's effective response against Falun Gong). For example, in November 2000, police jailed a female Falun Gong supporter and threatened to send her to the labor camps, where thousands of Falun Gong followers were already sent. *See id.* She remained obstinate even as her husband abused her and her boss

Beijing's quick and efficient crackdown on Falun Gong can be attributed to the unified front of various government institutions.²²⁸ China's top leaders recognized Falun Gong's potential as a political rival when, on April 25, 1999, ten thousand Falun Gong followers protested for twelve hours outside Zhongnanhai, the Chinese leadership compound in Beijing, over alleged pressure and discrimination from the government.²²⁹ The protest was the largest organized demonstration since the 1989 Tiananmen student protest and was perceived by the Chinese government to be a direct challenge to its authority.²³⁰

Beijing initially responded by declaring Falun Gong an "illegal organization" on July 22, 1999.²³¹ "Between the April 1999 Zhongnanhai gathering and the ultimate condemnation by the Chinese authorities in early 2000, a full scale attack on Falun Gong was marshaled, with the full backing of legal instruments from the ministries of the State Council, the Supreme People's Court and the National People's Congress."²³² In a synchronized effort, the executive branch (through the Ministry of Civil Affairs and Public Security) censored Falun Gong activities, the NPC set crimes and penalties specifically for Falun Gong activities, and the Supreme

threatened to fire her. *See id.* "Then someone brought her weeping daughter to jail," which finally broke her will. *Id.* While the woman promised in writing "never to demonstrate . . . for Falun Gong again," Beijing wanted more. *Id.* The government locked her up in a hotel room for five days along with other former Falun Gong practitioners. *See id.* They ridiculed the Falun Gong doctrine and blamed the woman for the breakdown of her family. *See id.* By the end of her ordeal, she had completely renounced the religion and was later made to lead similar sessions herself. *See id.* The former art teacher now says, at least for the record, that her spirituality is dead. *See id.* "Meeting by meeting, person by person, through a vast chain reaction of threats, slaps, intimidation and violence, China's Communist Party has broken Falun Gong . . ." *Id.* Nowhere was this clearer than on the second anniversary of the April 1999 protests, when only thirty people protested in Tiananmen Square. *See id.* But see Anne S.Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong*, 13 PAC. RIM L. & POL'Y J. 1, 22 (2004) (arguing Falun Gong has "proven particularly resilient despite the government's systematic crackdown"). Despite Beijing's efforts to eliminate the group, Falun Gong still claims 70 million members in China and 30 million members overseas. *See id.* at 22 n.120.

228. For a further discussion of Beijing's efficient Falun Gong crackdown, see *infra* notes 225-35 and accompanying text.

229. *See* Cheung, *supra* note 227, at 22 (describing initial mass protest by Falun Gong members). The Falun Gong followers protested the publication of an article that was critical of their movement. *See id.*

230. *See id.* ("Falun Gong arguably represents the greatest internal threat that the Chinese government has faced in the post-Mao period . . .").

231. *See id.* at 23 (describing initial government response to Falun Gong).

232. *Id.* In June 1999, Beijing established the 610 Office to specifically deal with Falun Gong. *See id.* The 610 Office could supersede the "the law, the courts, the procuratorial organs, public security organs and the government." *Id.* at 23-24.

People's Court zealously prosecuted Falun Gong members while ignoring individual and group rights.²³³

Although some Chinese leaders adopted more moderate opinions regarding Falun Gong prior to its suppression, after the first judicial enforcement proceeding, "all branches of government and institutions were unified in support of the crackdown."²³⁴ In addition to arrests and deaths, Falun Gong claims "6,000 members were sentenced without trial, 100,000 were sent to re-education camps, and several thousands were sent to mental asylums."²³⁵

b. Beijing's Crackdown on Local Government Officials

In addition to Falun Gong, Beijing has recently cracked down on corrupt local officials.²³⁶ Led by President Hu Jintao, the gov-

233. See Bejesky, *supra* note 216, at 165 n.131 (describing response by each branch of China's government). On October 15, 1999, Chinese officials labeled Falun Gong a "cult." See Cheung, *supra* note 227, at 24. The Standing Committee of the NPC then promulgated an official interpretation of the 1997 Criminal Code that allowed for "severe punishment" of "heretical cult" members. See *id.* at 24-25. Finally, "in November 1999, the Supreme People's Court notified all Chinese courts that all judicial officers should implement the NPC interpretation regarding heretical organizations, uphold the party line and apply the law in interest of maintaining social stability." *Id.* at 25. On November 30, 1999, the Intermediate People's Court in Haikou heard the first case against Falun Gong members. See *id.* "The four defendants were sentenced to two to fourteen years imprisonment for organizing illegal gatherings and spreading Falun Gong doctrine." *Id.* Harsher penalties were imposed in later trials. See *id.*

234. Bejesky, *supra* note 216, at 165 (describing unity of government efforts against Falun Gong).

235. Cheung, *supra* note 227, at 25-26 (noting results of Beijing's crackdown on Falun Gong between July 1999 and December 2001). Part of Beijing's campaign against Falun Gong included securing the signatures of one million children denouncing Falun Gong. See Forney, *supra* note 227 (describing further tactics employed by Beijing against Falun Gong). In the famous eastern lakefront city of Hangzhou, a school even forced grammar-school students to attend an anti-Falun Gong lecture. See *id.* Afterwards, students "took turns facing their classmates to swear: 'I do not believe in Falun Gong. I believe in science.'" *Id.* One eight-year-old surprised his teachers when he declared "I do not believe in Falun Gong. I believe in Jesus." *Id.* The school did not discipline the student. See *id.* While teaching at a college in China in 2002, the author of this Comment was told that Falun Gong instructed its members to "murder other people." The author has traveled through several Chinese provinces since 2002 (a couple years after Beijing's Falun Gong crackdown) and never saw a trace of Falun Gong activity.

236. See Edward Cody, *China's Crackdown on Corruption Still Largely Secret*, WASH. POST, Dec. 31, 2006, at A19, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000932.html> (discussing removal of several major party officials in 2006 on corruption charges); *China Punishes 100,000 Party Members in Anti-Corruption Drive*, AGENCE FR.-PRESSE, Feb. 13, 2007, http://ca.news.yahoo.com/s/afp/070213/world/china_corruption_party ("Nearly 100,000 members of China's ruling Communist Party were punished last year for corruption" (quoting Gan Yisheng, Vice Secretary of the Central Commission for Discipline Inspection)). According to Gan, "[o]f the 97,260 offi-

ernment's recent campaign against bribery and embezzlement resulted in the dismissal of four major local officials in 2006.²³⁷ Like the Falun Gong crackdown, the recent campaign against corrupt officials was again motivated by fear that "unless corruption is brought under control, it will undermine [Beijing's] control in the country."²³⁸ Besides corrupt officials, Beijing's crackdown has removed judges for accepting bribes to fix cases.²³⁹ "[I]n the 12 months to June 2006, more than 3,100 commercial bribery cases were uncovered involving government employees, worth \$121 million."²⁴⁰

The boldness of these dismissals, along with the government's official campaign against corruption, may impact the country's piracy industry because, as noted in Section II, some local officials and judges contribute to IP piracy by protecting or tolerating the piracy manufacturing centers in their areas.²⁴¹ Bribery and other corruption inevitably follow.²⁴² President Hu's intensifying cam-

cials who had been disciplined, over 80 percent had failed to carry out duties, taken bribes or violated the party's financial rules" *Id.*

237. See Cody, *supra* note 236 (describing results of Beijing's crackdown on corrupt officials). The first case involved Shanghai's former Communist Party Chief Chen Liangyu. See *Shanghai'd*, *ECONOMIST*, Sept. 30-Oct. 6, 2006, at 49. It appears that President Hu removed Chen as a warning to other provincial and lower level officials who have "blithely ignore[d] the central government's efforts to tame the economy." See *id.* The fourth case, and last major removal of 2006, involved Du Shicheng, the now former deputy party secretary of Shandong province and party secretary of Qingdao city. See Cody, *supra* note 235. Although the government merely accused him of violating party discipline, unofficial reports claim that Du was "involved in kickbacks associated with a huge building boom in Qingdao, a northeastern port that is home to China's best-known beer and the site for sailing races in the 2008 Olympic Games." *Id.*

238. Scott McDonald, *Hu Continues Graft Crackdown in China*, ASSOCIATED PRESS, Jan. 10, 2007, <http://www.cbsnews.com/stories/2007/01/10/ap/world/mainD8MILP5O0.shtml>.

239. See *id.* (commenting on removal of judges from Anhui province and Shenzhen).

240. *Id.* President Hu has also begun cracking down on corruption in the military, which was traditionally considered untouchable. See Mark Magnier, *China's Leaders Take Aim at Military Corruption*, L.A. Times, Jan. 17, 2007, available at <http://www.latimes.com/news/printedition/asection/la-fg-china17jan17,1,5274220.story> (indicating Beijing's new tough line on military corruption). "Hu Jintao is showing he's now in charge Until now, he's moved very slowly in this area." *Id.* (quoting Prof. Joseph Cheng of City University of Hong Kong).

241. For a further discussion describing the role of local officials in Chinese film piracy, see *supra* notes 94-101 and 162-69 and accompanying text.

242. See Priest, *supra* note 8, at 823 (noting involvement of local officials in piracy industry). "Local enforcement officials sometimes seek bribes in order to perform their duties." *Id.* These "fee" requests, which may amount to "tens of thousands of dollars," pose a serious obstacle to copyright owners and companies. See *id.*

paign illustrates Beijing's ability to rein in corrupt local officials, including those responsible for IP piracy.²⁴³

IV. CONCLUSION: PRESSURING BEIJING TO CRACK DOWN ON FILM PIRACY

If the MPAA studios want to effectively curb film piracy, they will have to properly address the three aforementioned piracy factors: access, price, and quality.²⁴⁴ Yet it is doubtful that pursuing a WTO case or litigating against piracy retailers or suppliers will have any effect on those three factors. The former may not succeed at all,²⁴⁵ while the latter faces a myriad of obstacles including local protectionism, a weak judiciary, and the enormity of China's IP piracy problem.²⁴⁶

Instead, the MPAA should convince Beijing that film piracy is a real threat to its economic interests, just as Falun Gong and corrupt local officials were recognized as threats to Beijing's authority.²⁴⁷ This may prompt Beijing to reevaluate its own interests and consider initiating a crackdown on film piracy.²⁴⁸ To begin with, Beijing can unilaterally address some of the key factors behind film

243. See Cody, *supra* note 236 (describing Beijing's efficiency in purging corrupt officials). The effects of President Hu's crackdown are already being felt in China. See *id.* "[O]fficials across the country have begun to think twice about accepting bribes, or at least to think about keeping them discreet." *Id.* (quoting wealthy Beijing entrepreneur). Further, the Central Discipline Inspection Commission has increased its control over inspections at local levels. See *id.* This move should prevent corrupt local officials from protecting each other. Beijing, however, probably cannot effectively remove corrupt officials without cooperation from politically independent agencies. See *id.* Some Chinese experts question whether fighting corruption by "having the party investigate its own" will be effective. *Id.* Unless Beijing allows for an independent judiciary to investigate and prosecute corrupt officials, its crackdown attempt will likely fail. See *id.*

244. For a further discussion of film piracy's consumer success in China, see *supra* notes 62-85 and accompanying text.

245. For a further discussion of the problems confronting the U.S. in a WTO case against China, see *supra* notes 107-32 and accompanying text.

246. For a further discussion of the problems confronting the MPAA in a lawsuit against film piracy in China, see *supra* notes 133-69 and accompanying text.

247. For a further discussion of the merits on convincing China to effectively combat film piracy, see *supra* notes 170-243 and accompanying text.

248. See Chow, *Commercial Piracy*, *supra* note 81, at 224-25 (arguing that protecting IP rights in China will require serious commitments from Beijing). *But see* E-mail from Prof. Daniel C.K. Chow, Robert J. Nordstrom/Porter Wright Morris & Arthur Designated Professor of Law, The Ohio State University Michael E. Moritz College of Law, to Oliver Ting, J.D. Candidate, 2007, Villanova University School of Law (Jan. 8, 2007, 06:11:51 EST) (on file with author) (arguing that Beijing will not likely view film piracy threat as equivalent to Falun Gong). Beijing has the ability to wipe out piracy in six to twelve months if it chooses to. See *id.* Currently, the only counterfeit threat that Beijing takes seriously is counterfeit money, which it effectively suppresses. See *id.*

piracy. First, China should relax the twenty foreign film quota and eliminate blackout periods, thereby eliminating film piracy's monopoly on many newly released foreign films in China while creating greater consumer access, a key element to film piracy's consumer success in China.²⁴⁹

Next, Beijing should move to confront film piracy retailers and, more importantly, those film pirates in local rural areas.²⁵⁰ Given their brutal campaign against Falun Gong, Chinese officials arguably cannot make excuses about their lack of power. While ostensibly a piracy crackdown may upset rural economies and risk protests from local populations,²⁵¹ China remains a solid totalitarian state and Beijing can still effectively put down protests and up-

249. See *International IPR Report Card – Assessing U.S. Government and Industry Efforts to Enhance Chinese and Russian Enforcement of Intellectual Property Rights Before the Subcomm. On Courts, the Internet, and Intellectual Property of the H. Comm.*, 110th Cong. 3 (2005), Statement of Eric H. Smith, President, International Intellectual Property Alliance) [hereinafter *Smith, IPR Report Card*] (noting how Taiwan and South Korea were able to more effectively combat piracy after they “substantially reduced all significant barriers to the entry of legitimate product allowing right holders to satisfy the demand with legitimate product”). The IIPA believes the foreign film quota is the most significant barrier to combating film piracy in China. See *id.* For a further discussion of the effects of China's foreign film quota on the film piracy industry, see *supra* notes 62-66 and accompanying text.

250. See *China Works out Long-term Strategy for Fight Against Piracy*, XINHUA, Sept. 13, 2006, available at http://english.peopledaily.com.cn/200609/13/eng20060913_302336.html (describing new Chinese enforcement mechanisms against DVD and CD piracy). Government efforts to crack down on film piracy have already begun. See *id.* China's Ministry of Culture devised a long-term enforcement mechanism in 2006 to perform “both routine checks and occasional raids of CD and DVD stores” *Id.* Police and transport departments must “clamp down on street peddlers and other illegal distributors without licenses and to break the transportation and sales network of pirated goods” *Id.* Chinese police have reported that by the end of August 2006, more than six million pirated DVDs and CDs were removed as part of the 100-day campaign. See *id.* Meanwhile, local police have “raided more than 32,000 publication markets and distribution companies, and closed down 355 companies engaged in bulk business of illegal copies” *Id.* The campaign, which began on July 25, 2006, is “unprecedented in terms of its duration and the number of government departments involved.” *Id.* But see IIPA, 2007 REPORT, *supra* note 44, at 96-97 (“Reports and surveys received both during and after the campaign from industry sources . . . noted this vast raiding activity but concluded, as in many previous campaigns of this nature, that pirate product remained available throughout the campaign in virtually the same quantities as before the campaign commenced.”). “[W]hen news of a major DVD confiscation is announced, the confiscation is a ‘mere drop in the bucket compared to what really passes through the market place in China.’” Heiberg, *supra* note 6, at 242 (quoting Eric H. Smith, President, IIPA).

251. See Chow, *Commercial Piracy*, *supra* note 81, at 223 (arguing that piracy crackdown in rural regions will result in political instability and possible riots); see also Michael Elliott, *The Chinese Century*, TIME, Jan. 22, 2007, at 35 (asserting that there are already tens of thousands of protests and riots by rural workers in China).

risings.²⁵² Further, news of a piracy crackdown in a local village may be restricted as the state media is tightly censored and can prevent news of any local unrest from spreading to other regions.²⁵³ Thus, Beijing can crack down on film pirates in rural areas without arousing support or sympathy from surrounding communities.²⁵⁴ The foreign media is also restrained as China recently announced rules that forbid foreign agencies from distributing “news that undermines China’s national unity or sovereignty or endangers China’s national security, reputation and interests.”²⁵⁵

While a Beijing-led piracy crackdown will not eradicate all counterfeit DVDs and VCDs, it should at least help lower the currently high piracy rate.²⁵⁶ Any decrease in the piracy rate will give MPAA studios a fighting chance to compete against the remaining

252. See Joseph Kahn, *Rioting in China Over Label on College Diplomas*, N.Y. TIMES, June 22, 2006, at 2, available at <http://www.nytimes.com/2006/06/22/world/asia/22china.html?pagewanted=2&ei=5088&en=0ae308ee9e9c1293&ex=1308628800&partner=rssnyt&emc=rss> (reporting nearly 80,000 mass protests recorded in China in 2005). “Most such events involve peasants, migrant workers or workers laid off from state enterprises, who often lack media-savvy leaders and rarely demand substantive political change.” *Id.*

253. REPORTERS WITHOUT BORDERS, CHINA – ANNUAL REPORT 2006 (2006), http://www.rsf.org/article.php3?id_article=17349 (summarizing Chinese censorship). “Every day, Chinese editors receive a list of banned subjects from the Propaganda Department, renamed the Publicity Department. These include demonstrations by peasants, the unemployed or Tibetans - nothing escapes the censors who stoke up a climate of fear within editorial offices.” *Id.* While teaching at two colleges in China, the author of this Comment noticed the vast majority of students knew nothing of the 1989 Tiananmen protest, let alone a local uprising in a rural town.

254. See Editorial, *Organ Harvesting and China’s Openness*, THE CHRISTIAN SCIENCE MONITOR, Aug. 3, 2006, available at <http://www.csmonitor.com/2006/0803/p08s02-comv.html> (discussing Beijing’s successful attempts to silence dissidents). Beijing has “shut down more than 700 online forums, and eight search engines have been ordered to block searches of about 1,000 banned words, including ‘Falun Gong’ and ‘Tiananmen Square.’” *Id.* (citing *South China Morning Post*).

255. Maureen Fan, *Critics Dispute Impact of China’s Revised Media Rules*, WASH. POST, Sept. 13, 2006, at A14, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/09/12/AR2006091201403.html?nav=rss_world (stating new rules for foreign media in China). The New China News Agency, the mouthpiece for Beijing, can decide what news and information will be released in China and can remove any information that it finds inappropriate. *See id.*

256. *Smith, IPR Report Card*, *supra* note 249, at 2-3 (arguing that China can, “where they have had the political will in a particular area . . . work through this problem and bring corrupt officials to justice”). To effectively combat piracy, a country’s leadership must firmly believe that doing so is in its best interest. *See id.* at 3. Only then will a zero-tolerance attitude percolate down to law enforcement. *See id.* For example, South Korea’s piracy rate in the “recording and film/video industries” during the 1980s was estimated at over eighty percent of the market. *See id.* at 2. Taiwan had piracy rates that were comparable to South Korea. *See id.* Yet by the mid to late 1990s, both countries had reduced their piracy rates to ten to fifteen percent. *See id.* The IIPA attributes these successes to a firm political will from their governments, which led to a judicial crackdown on piracy, expansion of

film piracy; perhaps by adopting the Warner Brothers' combination of price markdowns and premature DVD releases.²⁵⁷ In particular, the price markdowns on legitimate DVDs should help sustain the Chinese film market as the availability of cheap pirated DVDs declines.²⁵⁸

Even if the remaining film pirates continue to produce high quality "pristine" counterfeit DVDs, their marginally cheaper prices will no longer be as appealing to Chinese consumers, especially as their accessibility begins to wane.²⁵⁹ This scenario should allow the MPAA studios to capture a more significant percentage of the Chinese film market.²⁶⁰

While the *Superman Returns* pirated DVD sales in China indicate an uphill fight for the MPAA, convincing Beijing to join the fight against film piracy may be the MPAA's best option for competing in the world's largest market.²⁶¹ To persuade Beijing, though, the MPAA will have to go beyond merely reiterating its grievances and instead effectively communicate film piracy's harm to China's

market access, and cooperation with IP right holders in raiding piracy industries. *See id.* at 3.

257. For a further discussion of Warner Brothers' China strategy, see *supra* notes 83-84 and accompanying text. Besides lowering prices and releasing DVDs earlier, Warner Brothers sells its legitimate DVDs in Chinese shops where the inventory is almost exclusively pirated DVDs. *See* Guilford, *supra* note 80 (describing efforts to reach maximum number of customers). Most Chinese and expatriates generally do not buy DVDs in department stores or other more formal retail stores. *See id.* Warner Brothers also became the first U.S. home video company to partner with a Chinese company. *See Superman Returns Today – in Licensed DVDs*, CHINA DAILY, Sept. 28, 2006, available at http://www.chinadaily.com.cn/china/2006-09/28/content_698602.htm (stating unprecedented move by U.S. home video company). China Audio Video controls fifty-one percent of the joint venture with Warner Brothers. *See id.*

258. *See* Elaine Kurtenbach, *Companies Fight Back Against China Piracy*, ASSOCIATED PRESS, July 2, 2006, <http://abcnews.go.com/Business/wireStory?id=2146055&page=3> (discussing results of Warner Brothers' efforts to sell relatively affordable legitimate DVDs alongside pirated DVDs in China). Although he refused to disclose sales data, Tony Vaughan, the managing director of CAV Warner Home Entertainment Co. (a Warner Brothers joint venture distribution company in China), maintained that the early results of the company's efforts to sell cheap legitimate DVDs in China have been positive. *See id.*

259. *See Bootlegging Returns*, *supra* note 1 (discussing small difference in price between legitimate Warner Brothers DVD and pirated DVD in China).

260. *See* Kurtenbach, *supra* note 258 (discussing initial positive results from selling legitimate DVDs alongside pirated DVDs). "That's part of the strategy of gradually converting the market . . . [t]his is the beginning. There's a long, long way to go." *See id.* (quoting Tony Vaughan, managing director of CAV Warner Home Entertainment Co.).

261. *See* Wang, *supra* note 35, at 299 (arguing that until IP enforcement becomes part of Beijing's agenda, actual enforcement is "lost amidst the sea of discretionary bodies at the provincial, local, and national levels, and across the administrative and judiciary sectors").

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film industry and its overall economic interests.²⁶² In the words of Captain Jack Sparrow in *Pirates of the Caribbean: Dead Man's Chest*: "We are very much alike, you and I, I and you . . . us."²⁶³

Oliver Ting*

262. For a further discussion on how the MPAA can effectively convince Beijing to crack down on film piracy, see *supra* notes 170-206 and accompanying text.

263. Memorable Quotes from *Pirates of the Caribbean: Dead Man's Chest* (2006), <http://www.imdb.com/title/tt0383574/quotes> (last visited Mar. 8, 2007) (listing quotes from *Pirates of the Caribbean: Dead Man's Chest*). For a further discussion on revenue loss from film piracy by MPAA studios and China, see *supra* notes 170-206 and accompanying text.

* J.D. Candidate, May 2007, Villanova University School of Law; A.B., Fordham University, 2002. I thank God for His guidance and my family and the editors at the Villanova Sports & Entertainment Law Journal for their support.